Supreme Court, U.S.
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No. 03-0315

IN THE

Supreme Court of the United States

ALBERT DURRUTHY,

Petitioner,

v.

OFFICER JENNIFER PASTOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Eleventh Circuit Failed to Follow *Hope v. Pelzer*, 536 U.S. 730 (2002)?

II. Whether the Eleventh Circuit Exceeded its Jurisdiction by Reevaluating the Sufficiency of the Evidence in a Qualified Immunity Case?

LIST OF PARTIES

Officer Jennifer Pastor is the only Respondent. The City of Miami is being served as an interested party.

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Petitioner Albert Durruthy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 351 F.3d 1080. (App. A) The opinion of the District Court is reported at 235 F. Supp.2d 1291. (App. B)

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on November 26, 2003. The petition for rehearing and for rehearing en banc was denied on February 10, 2004. (App. C) This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983, Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory

decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Fourth Amendment to the Constitution of the United States provides that people have the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This petition seeks review of a civil rights case wherein the violent arrest of a television cameraman engaged in newsgathering was captured on videotape. The Eleventh Court, over the dissent of visiting Judge Norman H. Stahl of the United States Court of Appeals for the First Circuit, reversed the Federal District Court's denial of qualified immunity to Respondent Officer Jennifer Pastor. The action was properly before the Federal District Court based on the inclusion of a 42 U.S.C. § 1983 claim in the original cause of action.

As displayed on the videotape of his arrest, Mr. Durruthy entered a cleared and secured intersection, which was closed to vehicular traffic, to film an officer arresting NBC cameraman Bruce Bernstein on April 22, 2000 during the Elian Gonzalez saga. Mr. Durruthy did so in the same exact manner he employed under police supervision, and with express police approval, during the preceding four (4)

months. The intersection was closed to vehicular traffic, and there were no acts of civil disobedience occurring in the intersection; there were no protestors in the streets, no cars in the street, and the police were *not* trying to clear the street/ intersection on which Mr. Durruthy was filming. According to Respondent Officer Pastor, the police were not concerned with acts of civil disobedience within the intersection where she arrested Mr. Durruthy.

When another officer instructed Mr. Durruthy to return to the sidewalk, Mr. Durruthy complied by immediately moving backwards away from the police officer and towards the curb. Pastor and Raul Martinez, the Chief of Police, also agree that Mr. Durruthy moved backward when instructed to do so by the officer. Nevertheless, Pastor, who was standing in a line of police officers approximately 60 feet away, rushed towards Mr. Durruthy to initiate his arrest.

Pastor admits that although she identified Mr. Durruthy as a member of the press and saw that Mr. Durruthy was carrying a large television camera, she did not extend him any special courtesies. Instead, Pastor violently pinned Mr. Durruthy to the ground and forcibly secured him by wrenching his right arm behind his back. Despite Mr. Durruthy's obvious intentions to cooperate, complete lack of resistance and prior working relationship with the police, Pastor and the other officers continued to forcefully pin him to the ground and wrench his bad arm behind his back. Mr. Durruthy was held in a police van for six hours and then released.

In unlawfully arresting Durruthy, Pastor violated the following City of Miami policy:

> [N]O WARRANTLESS ARREST OF MEDIA PERSONNEL FOR NON-FELONIES ACTS ARISING OUT OF THE PURSUIT OF THE NEWS GATHERING FUNCTION WILL BE MADE WITHOUT THE EXPRESS AUTHORITY OF THE SENIOR ON-DUTY COMMANDING OFFICER OR THE STAFF DUTY OFFICER.

(as in original). Chief Martinez explained the department's media policy as follows: (a) members of the media are granted a higher degree of courtesy than the average citizen, (b) the City's policy is to ask a member of the media to move to another area if they are in an area that would compromise a crime scene or impede the officer's ability to do her job and (c) if the member of the media complies with the officer's request to move, that is the end of the incident. Pastor admits that she did not extend any special courtesies to Mr. Durruthy, and did not obtain the express authority of any senior on-duty commanding officer to arrest Mr. Durruthy.

Pastor filed a motion for summary judgment based on qualified immunity. The District Court agreed with Durruthy and denied Pastor's motion. However, on appeal the Eleventh Circuit, over the dissent of Judge Stahl, disagreed and reversed.

REASONS FOR GRANTING THE PETITION

Review is imperative because the questions presented herein impact fundamental constitutional rights, as well as essential limitations on qualified immunity and federal jurisdiction. Moreover, the reasoning and conclusions reached by the Circuit Court are not only a distant departure from the accepted and usual course of judicial proceedings, they are in direct conflict with this Court's prior rulings in *Hope v. Pelzer*, 536 U.S. 730 (2002) and *Johnson v. Jones*, 115 S. Ct. 2151 (1995).

I. THE ELEVENTH CIRCUIT FAILED TO FOLLOW *HOPE v. PELZER*, 536 U.S. 730 (2002).

Despite this Court's admonishment in *Hope*, the Eleventh Circuit once again applied an unduly "rigid gloss" in analyzing whether Respondent Pastor violated a clearly established right of which a reasonable person would have known. The majority held that the only way to show that a clearly established right was violated is by "pointing to materially similar case that has already decided that what the police officer was doing was unlawful" or, in the absence of case law, "when the words of the pertinent federal statute or federal constitution provision . . . [are] specific enough to establish clearly the law applicable to particular conduct and circumstances to overcome qualified immunity." *Durruthy*, 351 F.3d 1080. The actual standard, as set forth by the Supreme Court in *Hope* and *Lanier*, is not so limited.

In *Hope*, this court overruled the Eleventh Circuit's ruling on a summary judgment order, based on a finding of qualified immunity, where the Circuit Court applied the incorrect analysis in evaluating the second prong of the

Saucier test. The second prong of the *Saucier* test requires a court to assess, if a constitutional right has been violated, whether that right is clearly established. The *Hope* opinion clarified that "[f]or a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope,* 536 U.S. 730 at 739 (internal quotation and citation omitted).

This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Hope,* 536 U.S. 730 at 739. The proper analysis a court ought to undertake in assessing whether the right was clearly established is whether the state of the law at the time of the incident would have given the official fair warning that the behavior was unconstitutional. *Id.* at 741. Accordingly, "officials can still be on notice that their conduct violates establishes law even in novel factual circumstances." *Id.*

A. Mr. Durruthy's right to not be improperly arrested, under the facts and circumstances in this case, was clearly established.

While the "words of the pertinent federal statute or federal constitutional provision *in some cases*" (*Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002) (emphasis added) may show a clearly established right, and in other cases "a very high degree of prior factual particularity may be necessary" (*Hope* at 741), the analysis does not end there. The *Hope* Court explained that "[] general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even

though the very action in question has [not] previously been held unlawful." *Hope* at 740. (internal citations and quotations omitted). Accordingly, "officials can still be on notice that their conduct violates established law even in novel factual circumstances" (*id.* at 741) where the general state of law provides "fair warning" that her acts were unconstitutional. *Id.*; *Holmes*, 321 F.3d at 1078.

This case, unlike *Hope* and other cases calling into question the validity of an arrest, offers a video tape of the arrest. The video shows that Pastor's conduct was obviously illegal, even absent similar case law. No reasonable police officer could have concluded that probable or arguable probable cause could have existed to arrest an obvious member of the press engaged in news gathering in a cleared and secured intersection that was barricaded on all corners to prohibit vehicular traffic. As concluded by the District Court below,

> [w]hen an obvious member of the media approaches a police officer in a cleared street, is instructed to return to the sidewalk, and complies with the instruction, a police officer should be aware that a custodial arrest based on interference with a police officer is illegal. After Plaintiff began complying with the officer's instruction, the only conduct that Pastor could base the arrest on was the fact that Plaintiff continued to film and walked away slowly. Pastor did not need specific case law to give fair warning that an arrest in these circumstances could violate Plaintiff's Fourth Amendment rights.

Durruthy, 235 F. Supp.2d 1291 at 1298. Tellingly, as demonstrated on the video, of the countless police officers at the scene, it was only Pastor who initiated the arrest and who likewise ignored the fair warning that such arrest was unlawful.

Furthermore, the City of Miami has an established policy against warrantless arrests of media members. This policy alone, or in conjunction with the totality of the circumstances, demonstrates that Pastor knew her conduct was unlawful. The policy prohibits such arrests absent the express permission of a superior officer, grants a higher degree of courtesy to the press than ordinary citizens, and mandates if a journalist complies with the officer's request to move, that is the end of the incident. *See* CITY OF MIAMI'S OFFICE BULLETIN #00-4 dated January 14, 2000. Pastor twice violated this policy by initiating Durruthy's arrest without permission from a commanding officer and initiating the arrest notwithstanding Durruthy's immediate compliance with the officer's request to return to the sidewalk.

In *Hope,* the existence of a law enforcement guideline played a role in ascertaining whether the legal right at issue in that case was clearly established. In the case at bar the majority refused to acknowledge the similarity between *Hope* and the instant case. In the absence of factually similar case law, it is evident that the instant case presents a novel set of factual circumstances. However, the majority failed to recognize that, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope* at 741.

Petitioner concedes that the existence of a City of Miami guideline "does not convert an illegal act into a suddenly

legal one." However, as noted by Judge Stahl, the guideline does militate in favor of denying qualified immunity to Pastor at the summary judgment stage. Pastor was charged with knowledge of the guideline and recognized Durruthy as a member of the media. Had the Eleventh Circuit abided by *Hope*, the court would have found that Durruthy's rights were clearly established, and clearly violated.

The ruling in this case evidences that the Eleventh Circuit failed to heed this Court's warning in *Hope* and continues to favor qualified immunity over enforcement of constitutional rights by requiring plaintiffs, asserting various constitutional violations, to meet a near impossible burden. As Judge Stahl noted, to uphold the Eleventh Circuit's ruling "sets the bar prohibitively high and tips the balance contemplated by qualified immunity away from the Constitution." *Durruthy*, 351 F.3d 1080 at 1099.

B. Mr. Durruthy's right to not be subject to excessive force, under the totality of the circumstances, was clearly established.

Although the law does not afford journalists greater rights than the average citizen, the District Court correctly found that no reasonable officer would believe that the level of force used to arrest Mr. Durruthy was necessary under the circumstances. One cannot ignore that Durruthy was a cameraman engaged in newsgathering at the time of his arrest when performing a qualified immunity analysis. The Circuit Court, however, erred in failing to acknowledge this distinction.

Mr. Durruthy was exercising his first amendment rights in a cleared and secured street, with the express permission of the police. As described by the District Court below:

> Plaintiff was a member of the media who was arrested in the street during a protest. As he approached the police officer in the street, carrying his camera, it would have been clear to anyone that he was a journalist. Obviously he was not a danger to the police officers or anyone else. He himself was not even protesting—he was merely filming another cameraman's arrest. It appears from the videotape that he was arrested because he continued to film as he walked back to the sidewalk. Thus, the only danger facing Pastor and the other police officers was to their reputation on account of Plaintiff's footage.

Durruthy, 235 F. Supp 2d 1291 at 1300; *see also Thornton v. City of Macon*, 132 F.3d 1395, 1400 (11th Cir. 1998) (per curium) (where the arrestee is not suspected of committing a serious crime, did not pose an immediate threat to anyone, and did not resist arrest, no force is required "and a reasonable officer thus would have recognized that the force used was excessive.").

The degree of forced used here was excessive for two separate and independent reasons. First, a reasonable officer could not have concluded that the physical force used by Pastor was necessary. Given Mr. Durruthy's status as a journalist engaged in newsgathering, that he complied with the officer's instructions and was not a threat to anyone, and that there were no riot activities or cars within the cleared and secured intersection, Pastor clearly applied excessive

force by forcing him to the ground, holding him down by kneeling in his back, and wrenching his arms behind him.

Second, there is no evidence that Pastor, or any other officer, made any threat of physical coercion, or even a simple request, that Mr. Durruthy submit to an arrest.

To conclude that a defendant officer arrested the plaintiff with excessive force, the court must evaluate "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Conner*, 490 U.S. 386, 396 (1989). "[T]he force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force, which is measured by the severity of the crime, the danger to the officer, and the risk of flight." *Lee,* 284 F.3d at 1198.

Mr. Durruthy was exercising his constitutional rights as a member of the press in a manner expressly approved by the City of Miami. Assuming *arguendo* he committed any crime, it was a de minimus crime at best. Further, Pastor and her Chief of Police conceded that Mr. Durruthy was not a threat to any private persons. Also, Pastor conceded that Mr. Durruthy was not attempting to flee. Chief Martinez acknowledged that Mr. Durruthy cooperated with Defendant Pastor by putting down his camera and kneeling on one knee. At a minimum, within the confines of summary judgment, Pastor's conduct cannot be deemed "not obviously unreasonable" such as to warrant a grant of qualified immunity. *Smith v. Mattox,* 127 F.3d 1416, 1420 (11th Cir. 1997).

As the video of the arrest makes clear, Mr. Durruthy was not a threat to any police officers. He did not in any way resist arrest. As a result, the force used was clearly excessive and grossly disproportionate to what the circumstances required.

There was simply no reason for a member of the press to be gang tackled by Pastor and her fellow officers, pinned down and hand-cuffed behind the back in the face of pleas to cooperate and the inability of his shoulder to move backward for cuffing. Accordingly, whether based on this case's unique facts, the police department guideline and/or the general state of the law, Pastor had fair warning that her acts were unconstitutional.

At a minimum, this evidence provides a material dispute of fact that precludes the entry of summary judgment. Thus, the Eleventh Circuit's reversal of the District Court could only be based on its failure to follow *Hope*.

II. THE ELEVENTH CIRCUIT EXCEEDED ITS JURISDICTIONAL LIMITATIONS.

The Eleventh Circuit overstepped its jurisdictional limitations by reviewing the factual sufficiency of the evidence after the district court made specific factual findings in denying the motion for summary judgment. Federal appellate courts review summary judgment rulings de novo under the following standard:

> In conducting de novo review of the district court's disposition of a summary judgment motion based on qualified immunity, we are required to resolve all issues of material fact in favor of the

> plaintiff. *See, e.g., Sheth v. Webster*, 145 F. 2d 1231, 1236 (11th Cir. 1998). "We then answer the legal question of whether the defendant[ ][is] entitled to qualified immunity under that version of the facts." *Thornton v. City of Macon*, 132 F.3d 1395, 1397 (11th Cir. 1998). Indeed, we approach the facts from the plaintiff's perspective because "[t]he issues appealed here concern 'not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of clearly established law.'" *Sheth*, 145 F.3d 1236 (quoting *Johnson v. Jones*, 515 U.S. 304, 311, 115 S. Ct. 2151, 2155, 132 L. Ed. 2d 238 (1995)). As this Court has repeatedly stressed, the "facts, as accepted at the summary judgment stage of the proceedings, may not be the actual facts of the case." *Priester v. City of Riviera Beach*, 208 F. 3d 919, 925, n.3 (11th Cir. 2000). Nevertheless, for summary judgment purposes, our analysis must begin with a description of the facts in the light most favorable to the plaintiff. *See Skritch v. Thornton*, 280 F.3d 1295, 1299 (11th Cir. 2002)

Lee, 284 F.3d 1188. A defendant's motion for summary judgment is an appealable collateral order only where "(1) the defendant was a public official asserting a defense of "qualified immunity," and (2) the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of "clearly established" law." *Johnson v. Jones*, 115 S. Ct. 2151 (1995).

Significantly, *Johnson* clarified that the "portion of a district court's summary judgment order that, though entered in a "qualified immunity" case, determines only a question of "evidence sufficiency," . . . is not appealable." *Id.* at 2156. Thus, the Circuit Court was not authorized to reevaluate the sufficiency of the evidence at this stage of the proceedings. Despite this limitation, the majority improperly reviewed and discounted material facts, and ignored other material facts, to support its reversal of the District Court.

For example, the majority acknowledged that the intersection Mr. Durruthy was in was cleared and that he entered the intersection with the express permission of the police. However, the majority did not accept those facts. Instead, the majority proceeded to review the factual sufficiency of, and weigh, these facts, which led the majority to later describe the scene as a "busy intersection at a chaotic time." *Durruthy*, 351 F.3d 1080 at 1092.

Further, Mr. Durruthy alleged he had been filming the Elian saga, with the express permission of the police, in the same manner as he was on the day in question for four months preceding his arrest. The Circuit Court was bound to accept these allegations as true and consider them in the light most favorable to Mr. Durruthy at this stage of the proceedings. However, the Circuit Court improperly discounted and distorted the importance of this permission and Durruthy's previous course of conduct, and summarized these allegations as: "[T]here is no evidence Durruthy had express permission to be in the street at the time and location of the arrest. His evidence of "permission" is vague, general, and states at the highest order of abstraction." *Id.* at 1091.

Moreover, it is axiomatic that in conducting a de novo review of any summary judgment motion, the Circuit Court is required to resolve all issues of material fact in favor of the plaintiff. *Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002). Here, the Circuit Court failed to properly resolve all issues of material fact in favor of Mr. Durruthy. As outlined above, there exists a clear factual dispute as to whether Durruthy was given permission to be in the street filming on the day of his arrest. Another factual dispute exists as to whether Durruthy's permission put Pastor on sufficient notice that the arrest was unjustified.

In short, the propriety of Mr. Durruthy's arrest hinges on the resolution of disputed material facts. Rather than consider these disputed material facts in the light most favorable to Mr. Durruthy, the majority incorrectly resolved them in favor of Pastor. As a result, the majority erred by failing to abide by the appropriate standard of review when faced with a summary judgment motion and, as a result, erred by concluding that Mr. Durruthy's arrest was justified.

Petitioner recognizes that factual disputes do not warrant the exercise of this high Court's jurisdiction. However, the Circuit Court's failure to follow the appropriate review of a summary judgment motion by examine the facts under the appropriate light, is of the utmost significance as it amounts to the court having overstepped its jurisdictional limitations. As such this violation necessitates review.

Pastor was not permitted to appeal the District Court's decision based on the sufficiency of the evidence. Such findings are not appealable interlocutory findings under *Johnson*, and thus the Circuit Court was not authorized to reevaluate the factual findings made by the District Court.

The language of the Circuit Court's opinion makes clear that the decision hinges upon new and improper findings resulting from a review of the facts in a light unfavorable to Mr. Durruthy. However, as found by the District Court, the material facts, when viewed in the light most favorable to Mr. Durruthy, support a denial of the summary judgment. As Judge Stahl described in his dissent:

> There were no acts of civil obedience taking place and no protestors or moving vehicles in the street. Moreover, the police were not clearing the area in which Durruthy was filming. Pastor herself was standing in a line of officers approximately sixty feet away from Durruthy. She left the line, without permission of any superior officer, and rushed over to Durruthy though she plainly saw that he was following another officer's direct order to "get off the street." She admitted that she was aware that Durruthy was a member of the press and saw that he was carrying a large television camera, but nonetheless helped pin him to the ground and forcibly secure him by wrenching his right arm behind his back and pressuring his head to the sidewalk. Through Durruthy repeatedly pled with Pastor and the other officers that he would go peacefully and that his "bad arm" would not bend backward, Pastor and the other officers did not relent.

Id. at 1095.

Similarly, Judge Stahl recognized, unlike the majority, that the alleged permission created a "genuine issue of material fact as to whether Pastor was aware, with notice

that Durruthy (and the media overall) was authorized to be in the street, that she was violating a clearly established federal right when she arrested him." In contrast, the majority not only failed to recognize the material issue of fact created by this allegation, but mistakenly chose to characterize the permission as "vague, general, and stated with the highest order of abstraction."

The Eleventh Circuit's improper reevaluation of the facts involved in this case are not only improper under the recognized rules of summary judgment, they amount to a violation of the Circuit Court's own jurisdictional limitations. For these reasons we implore this honorable Court to review this matter.

CONCLUSION

For the forgoing reasons, Petitioner respectfully requests that this Court grant review.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED NOVEMBER 26, 2003

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 02-17017

Nov. 26, 2003

Albert DURRUTHY,

Plaintiff-Appellee,

v.

Jennifer PASTOR, Officer, individually,

Defendant-Appellant.

Before HULL, MARCUS and STAHL* Circuit Judges.

MARCUS, Circuit Judge:

In this civil rights case, Defendant Jennifer Pastor ("Pastor"), a police officer in the City of Miami, appeals from the district court's denial of her motion for summary judgment on the basis of qualified immunity. Plaintiff Albert Durruthy ("Durruthy"), a freelance cameraman, claims, *inter*

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* Honorable Norman H. Stahl, United States Circuit Judge for the First Circuit, sitting by designation.

alia, that Pastor violated his rights under the Fourth Amendment when she arrested him for being in the busy intersection of Flagler Street and N.W. 27th Avenue in Miami as the police were trying to keep the streets clear on a chaotic day after the federal government removed young Elian Gonzalez from his family in Miami in order to return him to his father, who lived in Cuba. After thorough review of this record, including a series of videotaped recordings of the incident at issue, we conclude that Pastor is entitled to qualified immunity on Durruthy's wrongful arrest and excessive force claims. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

We review *de novo* a district court's disposition of a summary-judgment motion based on qualified immunity, applying the same legal standards as the district court. *See Lee v. Ferraro*, 284 F.3d 1188, 1190 (11th Cir.2002). A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We resolve all issues of material fact in favor of the plaintiff, and then determine the legal question of whether the defendant is entitled to qualified immunity under that version of the facts. *See Ferraro*, 284 F.3d at 1190.

The relevant facts are straightforward. On April 22, 2000, United States government officials removed a young boy, Elian Gonzalez, from his uncle's house to facilitate the boy's return to his father in Cuba. The reaction in some parts of

Appendix A

Miami was immediate and violent. Protestors took to the streets and, as the Plaintiff said, "[t]hat was the day of the riots in Miami." Durruthy Dep. at 17. Some people threw trash bins into the streets and set them on fire. Others threw bottles, rocks, and broken glass. At the major intersection of N.W. 27th Avenue and Flagler Street (one of the intersection's roads has six lanes, the other four), the scene was chaotic during some of the morning. Police were trying to clear the intersection of people and cars. Protesters were arrested at that location. Many cameramen were on hand, including Durruthy.

By Durruthy's account, he knew that Miami police officers were trying to clear the street. He observed that throughout the day he was "shooting officers arresting protesters, clearing the street, and I was shoulder to shoulder with these officers. And officers would grab me and say please, once you get your shot, please go back from the street, from tear gas, from launching tear gas, from arresting protesters." Durruthy Dep. at 78.

By 11:00 a.m. the intersection of Flagler Street and N.W. 27th Avenue was shut off to vehicular traffic, and police officers had cleared the demonstrators from the street. At that time, the police arrested a cameraman, Bruce Bernstein ("Bernstein"), and escorted him through the middle of the cleared street. Durruthy, a freelance cameraman who was on assignment to film the protests, ran into the street to film Bernstein's arrest up close.

The scene that followed was captured on a series of videotapes filmed by different people (including Durruthy)

and from different locations. While Durruthy was filming Bernstein's arrest in the street, an officer instructed Durruthy to get out of the street. Durruthy backpedaled toward the sidewalk, while continuing to film Bernstein's arrest. As Durruthy approached the sidewalk, Officer Pastor grabbed him from behind. Pastor and another officer then pulled Durruthy onto the ground, while struggling to pin his arms behind him and handcuff him. During the struggle, the other officer also kneed Durruthy in the back. Durruthy stated, "Sir, my arm . . . please sir . . . I am going peacefully, sir." Pastor held Durruthy down with her hands, while the other officer tied Durruthy's arms behind his back with flex cuffs. Officer Pastor testified that whenever anyone is being arrested, she assumes that the person is armed with a weapon. She also said that she had never seen the Plaintiff before the day of his arrest.

In a sworn declaration, Durruthy said that during the morning of April 22 other police officers let him enter the street, film his "shot," and return to the sidewalk on several occasions. He further stated that he had followed this procedure "countless" times during the previous four months without incident and with the permission of police. In his deposition, Durruthy testified that throughout that morning he had filmed officers arresting protestors and clearing the streets, and the officers had requested that he move out of the street once he got his "shot." Durruthy did not detail any of the specific circumstances surrounding these earlier incidents, nor did he identify any officer by name. Notably, however, Durruthy does not contend that *Pastor* allowed him to enter the streets at any time that day or in the past. Durruthy was charged with resisting, obstructing, or opposing

an officer in violation of Fla. Stat. § 843.02,[1] but the charges ultimately were dropped. Subsequently, Durruthy filed a complaint against the City of Miami and Pastor, alleging claims under 42 U.S.C. § 1983 for unlawful arrest and excessive force, in violation of the Fourth Amendment, as well as various state law claims. Pastor moved for summary judgment on the ground that she was entitled to qualified immunity. Pastor argued that not only did she have probable cause to arrest Durruthy for violating § 843.02, but she also had probable cause to arrest him for violating Fla. Stat. § 316.130,[2] Fla. Stat. § 316.072,[3] and § 54-2 of the Miami City Code.[4]

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1. This statute provides that:

> Whoever shall resist, obstruct, or oppose any officer as defined in § 943.10(1), (2), (3), (6), (7), (8), or (9); member of the Parole Commission or any administrative aide or supervisor employed by the commission; county probation officer; parole and probation supervisor; personnel or representative of the Department of Law Enforcement; or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or s. 775.083.

Fla. Stat. § 843.02.

2. Section 316.130 provides, in pertinent part, that "[w]here sidewalks are provided, no pedestrian shall, unless required by other circumstances, walk along and upon the portion of a roadway paved for vehicular traffic." Fla. Stat. § 316.130(3).

(Cont'd)

Appendix A

The district court denied Pastor's motion for summary judgment. First, the court found that there was no probable cause, or even arguable probable cause, to arrest Durruthy. *See Durruthy v. City of Miami*, 235 F.Supp.2d 1291, 1297-98 (S.D.Fla.2002). The court rejected Pastor's proffered bases

(Cont'd)

3. Under this statute:

> It is unlawful and a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083, for any person willfully to fail or refuse to comply with any lawful order or direction of any law enforcement officer, traffic crash investigation officer as described in § 316.640, traffic infraction enforcement officer as described in s. 316.640, or member of the fire department at the scene of a fire, rescue operation, or other emergency. Notwithstanding the provisions of this subsection, certified emergency medical technicians or paramedics may respond to the scene of emergencies and may provide emergency medical treatment on the scene and provide transport of patients in the performance of their duties for an emergency medical services provider licensed under chapter 401 and in accordance with any local emergency medical response protocols.

Fla. Stat. § 316.072(3).

4. Section 54-2 of the Miami City Code provides that "[i]t is unlawful for any person or any number of persons to stand, loiter or walk upon any street or sidewalk in the city so as to obstruct free passage over, on or along said street or sidewalk after a request by a law enforcement officer to move on so as to cease blocking or obstructing free passage thereon." Miami City Code § 54-2(b).

for probable cause, determining that Fla. Stat. § 843.02, Fla. Stat. § 316.072, and § 54-2 of the Miami City Code were not applicable because Durruthy complied with the officer's orders to get out of the street, even if he backpedaled and continued to film when ordered off the street, and that Fla. Stat. § 316.130 was inapplicable because it is directed at preventing pedestrians from walking among vehicular traffic. The court also found that although there was no specific Florida Supreme Court, Eleventh Circuit, or United States Supreme Court caselaw on point, Pastor's conduct was "obviously illegal, based on the complete lack of any reasonable basis for the arrest." *Id.* at 1298.

The district court also held that Pastor used excessive force against Durruthy. The court reasoned that because Durruthy was obviously a member of the media, was not protesting, and complied with the officer's requests and instructions, *any* use of "force was unnecessary. . . . In light of the circumstances, the force applied was illegally disproportionate." *Id.* at 1300. The district court also determined that it was clearly established that Pastor's conduct constituted excessive force. It acknowledged that there was no controlling and factually similar caselaw, but found that her conduct fell "within the category of cases in which the unlawfulness of the conduct is 'readily apparent even without identifying caselaw.'" *Id.* at 1301 (quoting *Smith v. Mattox,* 127 F.3d 1416, 1420 (11th Cir.1997)). This appeal ensued.

Appendix A

As we observed in *Lee v. Ferraro:*

> Qualified immunity offers "complete protection for government officials sued in their individual capacities as long as 'their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Thomas v. Roberts,* 261 F.3d 1160, 1170 (11th Cir.2001) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)) (additional quotations omitted). The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, *see Anderson v. Creighton,* 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987), protecting from suit "all but the plainly incompetent or one who is knowingly violating the federal law." *Willingham v. Loughnan,* 261 F.3d 1178, 1187 (11th Cir.2001). Because qualified immunity is a defense not only from liability, but also from suit, it is "important for a court to ascertain the validity of a qualified immunity defense as early in the lawsuit as possible." *GJR Invs., Inc. v. County of Escambia,* 132 F.3d 1359, 1370 (11th Cir.1998) (citation omitted).

284 F.3d at 1193-94. Whether a defendant is entitled to qualified immunity is a question of law, in other words, whether the law at the time of the incident was clearly established so that a reasonable person should have known

that he was violating it. *See Courson v. McMillian,* 939 F.2d 1479, 1487-88 (11th Cir.1991).

To receive qualified immunity, the public official must show that he was acting within the scope of his discretionary authority at the time the allegedly wrongful acts occurred. *See Ferraro,* 284 F.3d at 1194. On this record, it is undisputed that Officer Pastor was acting within her discretionary authority. Once it is established that the defendant was acting within her discretionary authority, "the burden shifts to the plaintiff to show that qualified immunity is not appropriate." *Id.* In evaluating claims of qualified immunity, we apply the two-part *Saucier* test: (1) "As a 'threshold question', a court must ask, '[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?'"; and (2) "If a constitutional right would have been violated under the *plaintiff's* version of the facts, the court must then determine 'whether the right was clearly established.'" *Id.* (quoting *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001)). This inquiry, in turn, " 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Id.* (quoting *Saucier,* 533 U.S. at 201, 121 S.Ct. at 2156). In *Saucier,* the Supreme Court noted that "[i]f no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." 533 U.S. at 201, 121 S.Ct. at 2156. However, if a constitutional right would have been violated under the plaintiff's version of the facts, the court must then determine whether the right was clearly established. *See id.*

Appendix A

Durruthy argues that Pastor violated his clearly established constitutional rights under the Fourth Amendment by arresting him without probable cause and by subjecting him to excessive force. We conduct the *Saucier* analysis separately for each of Pastor's claims. *See Ferraro,* 284 F.3d at 1194.

First, Durruthy says that his arrest was unlawful. Plainly, an arrest without probable cause violates the right to be free from an unreasonable search under the Fourth Amendment. *See Redd v. City of Enterprise,* 140 F.3d 1378, 1382 (11th Cir.1998) ("[A]n arrest made without probable cause violates the Fourth Amendment."). Under federal law, probable cause to arrest exists "when an arrest is 'objectively reasonable based on the totality of the circumstances.'" *McCormick v. City of Fort Lauderdale,* 333 F.3d 1234, 1243 (11th Cir.2003) (quoting *Ferraro,* 284 F.3d at 1195). "This standard is met when the facts and circumstances within the *officer's knowledge,* of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Id.* (internal citation and quotation marks omitted). "Although probable cause requires more than suspicion, it 'does not require convincing proof,' and 'need not reach the [same] standard of conclusiveness and probability as the facts necessary to support a conviction.'" *Ferraro,* 284 F.3d at 1195 (internal citations omitted).[5]

5. Pastor's personal motivation for arresting Durruthy is irrelevant to the determination whether she had probable cause. There is no question that an officer's subjective intent is immaterial when (Cont'd)

Moreover, probable cause determinations are generally *ex parte* determinations, *see, e.g., United States v. R. Enters., Inc.*, 498 U.S. 292, 298, 111 S.Ct. 722, 726, 112 L.Ed.2d 795 (1991) ("The same rules that, in an adversary hearing on the merits, may increase the likelihood of accurate determinations of guilt or innocence do not necessarily advance the mission of a grand jury, whose task is to conduct an *ex parte* investigation to determine whether or not there

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(Cont'd)

there is an objectively reasonable basis for believing that an offense has occurred. *See, e.g., Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *United States v. Holloman*, 113 F.3d 192, 194 (11th Cir.1997) (*per curiam*) ("[*Whren*] conclusively refutes the notion that ulterior motives may invalidate police conduct that is justified on the basis of probable cause to believe that a violation of law has occurred."); *see also Holland v. City of Portland*, 102 F.3d 6, 9-10 (1st Cir.1996) (following *Whren*'s holding with respect to subjective intent in probable cause determinations); *United States. v. Dhinsa*, 171 F.3d 721, 724-25 (2d Cir.1998) (same); *Rogers v. Powell*, 120 F.3d 446, 453 n. 5 (3d Cir.1997) (same); *United States v. Bullock*, 94 F.3d 896, 899 (4th Cir.1996) (same); *United States v. Escalante*, 239 F.3d 678, 680-81 (5th Cir.2001) (same); *United States v. Herbin*, 343 F.3d 807, 809-810 (6th Cir.2003) (same); *Williams v. Vasquez*, 2003 WL 1796030, *4-*5, 62 Fed.Appx. 686, 690-91 (7th Cir.2003) (same); *Johnson v. Crooks*, 326 F.3d 995, 998 (8th Cir.2003) (same); *United States v. Ibarra*, 345 F.3d 711, 713-14 (9th Cir.2003) (same); *United States v. Villa-Chaparro*, 115 F.3d 797, 801 (10th Cir.1997) (same); *United States v. Bookhardt*, 277 F.3d 558, 565-66 (D.C.Cir.2002) (same); *Arkansas v. Sullivan*, 532 U.S. 769, 771-72, 121 S.Ct. 1876, 1878, 149 L.Ed.2d 994 (2001) (rejecting Arkansas Supreme Court's finding that the "subjective intent" language in *Whren* was nonbinding dicta).

is probable cause to prosecute a particular defendant."), which are made on the basis of the evidence extant. *See United States v. Gonzalez,* 969 F.2d 999, 1003 n. 6 (11th Cir.1992) ("[T]he court must decide whether the objective facts available to the officers *at the time of arrest* were sufficient."). Thus, in *Pickens v. Hollowell*, for example, we held that two deputies "who otherwise had probable cause to arrest [the plaintiff] pursuant to facially valid arrest warrants [ ] did not have a duty to investigate and decide the potential viability of a defense . . . before arresting [the plaintiff]." 59 F.3d 1203, 1207 (11th Cir.1995).

We add that officers who make an arrest without probable cause are still "entitled to qualified immunity if there was arguable probable cause for the arrest." *Jones v. Cannon,* 174 F.3d 1271, 1283 (11th Cir.1999) (citing *Lindsey v. Storey,* 936 F.2d 554, 562 (11th Cir.1991)). Arguable probable cause exists when "an officer reasonably could have believed that probable cause existed, in light of the information the officer possessed." *Montoute v. Carr,* 114 F.3d 181, 184 (11th Cir.1997); *see also Jones,* 174 F.3d at 1283. As we framed the concept in *Lee v. Ferraro:*

> Arguable probable cause exists "where reasonable officers in the same circumstances and possessing the same knowledge as the Defendant[ ] could have believed that probable cause existed to arrest." *Id.* (quoting *Redd,* 140 F.3d at 1382 (internal citations omitted)). In determining whether arguable probable cause exists, "[w]e apply an objective standard, asking 'whether the officer's actions are objectively reasonable . . .

> regardless of the officer's underlying intent or motivation.'" *Vaughan v. Cox,* 264 F.3d 1027, 1036 (11th Cir.2001) (quoting *Montoute,* 114 F.3d at 184). "Arguable probable cause does not require an arresting officer to prove every element of a crime or to obtain a confession before making an arrest, which would negate the concept of probable cause and transform arresting officers into prosecutors." *Scarbrough v. Myles,* 245 F.3d 1299, 1302-03 (11th Cir.2001).

284 F.3d at 1195.

After thorough review of the entire record, we are satisfied that Pastor had probable cause to arrest Durruthy for violating Fla. Stat. § 316.130,[6] and that, in any event, she had arguable probable cause to effect the Plaintiff's arrest. Again, § 316.130 provides, in pertinent part, that "[w]here sidewalks are provided, no pedestrian shall, unless required by other circumstances, walk along and upon the portion of a roadway paved for vehicular traffic." Fla. Stat. § 316.130(3). Notably, no command or direction by the police to leave the streets is required to establish a violation of this statute.[7] Under Florida law, a law enforcement officer may

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6. While Durruthy was charged with violating only Fla. Stat. § 843.02, Pastor is shielded by qualified immunity so long as she had probable cause to arrest Durruthy for *any* offense. *See Bailey v. Bd. of County Comm'rs of Alachua County,* 956 F.2d 1112, 1119 n. 4 (11th Cir.1992) ("The validity of an arrest does not turn on the offense announced by the officer at the time of the arrest.").

7. This is in contrast with the other statutes Pastor has proffered as bases for probable cause, all of which require an order or request:

(Cont'd)

arrest a person without a warrant if "[a] violation of chapter 316 has been committed in the presence of the officer." Fla. Stat. § 901.15(5). It is undisputed that Durruthy was walking in the middle of a street paved for vehicular traffic (the busy intersection of Flagler Street and N.W. 27th Avenue), where sidewalks were provided, and he was not *required* to do so by other circumstances. Moreover, plainly he was in the middle of the busy street at a chaotic time when the police were attempting to clear the streets, and by his own account, specifically knew that the officers were trying to clear that very intersection.

The district court nevertheless held that no probable cause existed under § 316.130, reasoning:

> The statute is directed at preventing pedestrians from walking among vehicular traffic. In this case, however, there was no vehicular traffic in the roadway. Further, [Durruthy] was not a pedestrian in the normal sense of the word but an obvious

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Fla. Stat. § 843.02 (making it a misdemeanor to "resist, obstruct, or oppose any officer"); Fla. Stat. § 316.072(3) (making it a misdemeanor "for any person willfully to fail or refuse to comply with any lawful order or direction of any law enforcement officer"); and § 54-2 of the Miami City Code (making it unlawful for any person to "walk upon any street or sidewalk in the city so as to obstruct free passage . . . after a request by a law enforcement officer to move on so as to cease blocking or obstructing free passage"). Because Pastor had probable cause to arrest Durruthy for violating Fla. Stat. § 316.130, we need not consider whether these other statutes provided additional bases for probable cause.

> member of the media acting within the scope of his journalistic duties. Under these circumstances, an arrest pursuant to § 316.130 could not be reasonable.

Durruthy, 235 F.Supp.2d at 1298. We disagree. First, the statute does not require that there be vehicular traffic in the roadway at the time of the offense. *See* Fla. Stat. § 316.130(3); *see also* Fla. Stat. § 316.003(42) (defining "roadway" as "[t]hat portion of a highway improved, designed, or *ordinarily used* for vehicular travel, exclusive of the berm or shoulder" (emphasis added)). Nor was it a surprise to anyone at that intersection on the morning of April 22, 2000, that the police had cleared protesters from the street. Second, the definition of "pedestrian" as "[a]ny person afoot," Fla. Stat. § 316.003(28), contains no exception for anyone, including members of the media. Indeed, at oral argument, Plaintiff conceded that Durruthy was entitled to no special deference or exception simply because he was a cameraman. Simply put, our case law makes clear that probable cause exists whenever an officer reasonably believes that an offense is being committed. It is therefore difficult to understand the claim that no probable cause, let alone arguable probable cause, existed to arrest Durruthy when the undisputed facts show him to have been in unmistakable violation of Fla. Stat. § 316.130(3). The wording of that provision says nothing about giving exemptions to people who violate the command of the statute when its intended purpose is otherwise satisfied. A driver who runs a red light when no other cars or pedestrians are around is not exempt from a traffic law requiring him to stop, even though the obvious purpose of the law—preventing accidents—may be moot at the time.

Appendix A

Section 316.130(3) unambiguously says that "[w]here sidewalks are provided, no pedestrian shall, unless required by other circumstances, walk along and upon the portion of a roadway paved for vehicular traffic." No one has denied that Durruthy did just that. Nor is there any suggestion in the record that circumstances somehow required or compelled him to walk in the intersection.

The heart of Durruthy's argument is that there was no probable cause for his arrest because he had permission to be in the street. The first problem with this contention is that there is *no* evidence Durruthy had express permission to be in the street at the time and location of the arrest. His evidence of "permission" is vague, general, and stated at the highest order of abstraction. The most that can be said is that other unnamed officers allowed him to be in unspecified streets, at unspecified locations, and under unexplained circumstances, *earlier* that morning, and that in the preceding four months he had gotten the implied and express permission of still other unnamed officers to shoot pictures in the street at unspecified locations and under unexplained circumstances.

In the second place, there is no evidence that Pastor knew other officers previously had allowed Durruthy to be in the street under unspecified circumstances, and, significantly, probable cause is determined based on the "facts and circumstances within the *officer's knowledge.*" *McCormick,* 333 F.3d at 1243; *see also Dahl v. Holley,* 312 F.3d 1228, 1233 (11th Cir.2002) (holding that the probable cause standard is met if, "at the moment the arrest was made, 'the facts and circumstances *within* [the officers'] knowledge and

of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing' that [the suspect] had committed or was committing an offense." (emphasis added) (quoting *Hunter v. Bryant,* 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991))); *see also Wilson v. Kittoe,* 337 F.3d 392, 398 (4th Cir.2003) (same); *Thacker v. City of Columbus,* 328 F.3d 244, 255 (6th Cir.2003) (same); *Johnson v. Campbell,* 332 F.3d 199, 211 (3d Cir.2003) (same); *Jocks v. Tavernier,* 316 F.3d 128, 135 (2d Cir.2003) (same); *United States v. Fiasconaro,* 315 F.3d 28, 34-35 (1st Cir.2002) (same); *United States v. Wesley,* 293 F.3d 541, 545 (D.C.Cir.2002) (same); *United States v. Henderson,* 241 F.3d 638, 648 (9th Cir.2000) (same); *McFarland v. Childers,* 212 F.3d 1178, 1186 (10th Cir.2000) (same); *Spiegel v. Cortese,* 196 F.3d 717, 723 (7th Cir.1999) (same); *Sanders v. Sears, Roebuck & Co.,* 984 F.2d 972, 976 (8th Cir.1993) (same); *Martin v. Thomas,* 973 F.2d 449, 453 (5th Cir.1992) (same).

Finally, even if we could somehow impute such knowledge to Pastor, we can discern no grounds for saying that she could not enforce Fla. Stat. § 316.130(3) simply because other officers in unspecified circumstances had not enforced it. The aforementioned driver who runs a red light does not get a free pass just because he ran another red light earlier in the day and was not stopped for that violation. Notably, mere selective enforcement of a law is not unconstitutional, and Durruthy has not even alleged selective prosecution based on improper grounds. *See United States v. Lichenstein,* 610 F.2d 1272, 1281 (5th Cir.1980) ("Though selective prosecution, if based on improper motives, can violate constitutional guarantees of equal protection, selective enforcement in and of itself is not a constitutional violation.

Therefore, to support a defense of selective prosecution, one must establish (1) that others similarly situated have not generally been prosecuted and (2) that the government's discriminatory selection of him is invidious, or in bad faith that is based on constitutionally impermissible considerations, such as race or religion." (citing *Oyler v. Boles,* 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962), and *United States v. Johnson,* 577 F.2d 1304, 1308 (5th Cir.1978))).[8]

Durruthy also points to an internal City of Miami Police Department Order saying that "[n]o warrantless arrest of media personnel for non-felonious acts arising out of the pursuit of the news gathering function will be made without the express authority of the senior on-duty commanding officer or the staff duty officer." R1-56, exhibit G. We are unable to understand how Pastor's failure to comply with this internal police department guideline vitiates probable cause. By its own terms, the guideline doesn't alter the elements of § 316.130, provide an affirmative defense, create any enforceable rights in a defendant, or otherwise undermine probable cause. *Cf. United States v. Beard,* 41 F.3d 1486, 1489 (11th Cir.1995) (holding that the Department of Justice's dual prosecution policy "is an internal policy [of self-restraint] which confers no enforceable rights on a criminal defendant"). Nor does it address precisely how an officer should react to the circumstances of directly seeing a violation of § 316.130 on a busy street at a chaotic time.

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8. Fifth Circuit decisions rendered prior to September 30, 1981 are binding precedent on this court. *See Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981).

We add that for qualified immunity purposes we are concerned only with the constitutional requirements of probable cause. *See Craig v. Singletary,* 127 F.3d 1030, 1044 (11th Cir.1997) (holding that, for purposes of determining whether probable cause exists, "we are only concerned with constitutional requirements . . . not with any local policies or with any strategic decisions of law enforcement officers"). The fact that Pastor may have violated an internal guideline may subject her to internal sanction, but it does not undermine objective facts—the Plaintiff was walking in the middle of a busy intersection at a chaotic time with specific knowledge that the police were trying to clear that street, and he was not required to be in the street—that otherwise establish probable cause, let alone arguable probable cause. Simply put, the internal guideline does not convert an illegal act suddenly into a legal one.

Moreover, even though we believe Pastor had probable cause to arrest Durruthy for violating Fla. Stat. § 316.130, she would also be "entitled to qualified immunity if there was [even] *arguable* probable cause for the arrest." *Jones,* 174 F.3d at 1283 (emphasis added). Here, Pastor was faced with making a close call on a difficult day, under chaotic circumstances. She had no knowledge that Durruthy previously had been allowed, by unknown officers and under unspecified conditions, to shoot pictures in the street. A reasonable officer could have believed, in light of the information Pastor possessed, that she had probable cause. *See Montoute,* 114 F.3d at 184 (holding that arguable probable cause exists when "an officer reasonably could have believed that probable cause existed, in light of the information the officer possessed").

We add that even if Durruthy had actually alleged the violation of a constitutional right, such a violation was not clearly established. A party may show that the law was clearly established, first by pointing to "'a materially similar case [that has] already decided that what the police officer was doing was unlawful.'" *Lee v. Ferraro,* 284 F.3d at 1198 (citation omitted). A party may also demonstrate the existence of clearly established law when "the words of the pertinent federal statute or federal constitutional provision . . . [are] specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, even in the *total absence of case law.* This kind of case is one kind of 'obvious clarity' case." *Vinyard v. Wilson,* 311 F.3d 1340, 1350 (11th Cir.2002) (footnote omitted) (emphasis in original). Thus, "the words of a federal statute *or* federal constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful." *Id.* (emphasis added).

No caselaw gave Pastor fair warning that she would be charged with the knowledge that other officers previously allowed Durruthy to film in the street, or that she somehow lacked probable cause to arrest Durruthy for violating § 316.130 because of that "permission." *See Williams v. Consol. City of Jacksonville,* 341 F.3d 1261, 1270 (11th Cir.2003) (noting that in determining whether the unlawfulness of an official's actions was clearly established, "the salient question . . . is whether the state of the law [at the time of the unconstitutional act] gave [the official] fair warning that [her] alleged treatment of [the plaintiff] was unconstitutional" (quoting *Hope v. Pelzer,* 536 U.S. 730, 741,

122 S.Ct. 2508, 2516, 153 L.Ed.2d 666 (2002))). Nor was Pastor on notice that an internal departmental guideline requiring her to obtain a superior officer's approval before making a misdemeanor arrest rendered an arrest otherwise based on probable cause unconstitutional or somehow vitiated that probable cause. No case to which we have been cited, or that we can find, even remotely suggests that the possible violation of an internal law enforcement guideline strips an officer of qualified immunity for an arrest founded on sufficient cause. In this context, we are reminded of the Supreme Court's admonition in *County of Sacramento v. Lewis*:

> Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance."

523 U.S. 833, 853, 118 S.Ct. 1708, 1720, 140 L.Ed.2d 1043 (1998) (citation omitted). Moreover, nothing found in the language of § 316.130 or in the command of the Fourth Amendment states with "obvious clarity" that Pastor's

conduct in arresting Durruthy was unlawful. *See Vinyard v. Wilson*, 311 F.3d at 1350.[9]

Durruthy also claims that Pastor used excessive force when she arrested him. "The Fourth Amendment's freedom from unreasonable searches and seizures encompasses the plain right to be free from the use of excessive force in the course of an arrest." *Ferraro*, 284 F.3d at 1197 (citation omitted). "The question is whether the officer's conduct is objectively reasonable in light of the facts confronting the

9. Parallels between this case and *Hope*, 536 U.S. 730, 122 S.Ct. 2508, are difficult to discern. There, the Supreme Court found a clear violation of the Eighth Amendment right to be free from cruel and unusual punishment when corrections officers handcuffed an inmate to a hitching post for seven hours in the hot sun without a bathroom break, all the while taunting the inmate about his thirst. Despite the absence of any emergency, the corrections officers knowingly subjected Hope to a substantial risk of physical harm and to unnecessary pain. Under these circumstances the Supreme Court observed that "[a]rguably, the violation was so obvious that our own Eighth Amendment cases gave the respondents fair warning that their conduct violated the Constitution. Regardless, in light of binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a DOJ report informing the ADOC of the constitutional infirmity in its use of the hitching post, we readily conclude that the respondents' conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 741-42, 122 S.Ct. 2508 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). No such notice existed in the case before us, nor were the police acts in arresting Durruthy for being in the middle of a busy intersection (in violation of Fla. Stat. § 361.130(3)) as they tried to keep the streets clear on a chaotic and riotous day remotely like the egregious conduct proscribed in *Hope*.

officer." *Vinyard v. Wilson*, 311 F.3d at 1347. We begin by observing that "[w]hen an officer lawfully arrests an individual for the commission of a crime, no matter how minor the offense, the officer is entitled under controlling Supreme Court precedent to effectuate a full custodial arrest." *Ferraro*, 284 F.3d at 1196. Indeed, under Florida law, like under federal law, a full custodial arrest is allowed even when the offense is only a misdemeanor. *See* Fla. Stat. § 901.15(1) ("A law enforcement officer may arrest a person without a warrant when . . . [t]he person has committed a felony or misdemeanor . . . in the presence of an officer."). In this inquiry, we consider such factors as "'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Ferraro*, 284 F.3d at 1197-98 (quoting *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989)).

The district court determined that the force applied by Pastor was illegally disproportionate because *no* force was acceptable under these circumstances. *See Durruthy*, 235 F.Supp.2d at 1300. We disagree. This circuit has made clear that some use of force by a police officer when making a custodial arrest is necessary and altogether lawful, regardless of the severity of the alleged offense. *See Ferraro*, 284 F.3d at 1197 ("'Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.'" (quoting *Graham*, 490 U.S. at 396, 109 S.Ct. at 1871-72)). Quite simply, the police were allowed to use some force in effecting

the Plaintiff's arrest. Furthermore, "the application of de minimis force, without more, will not support a claim for excessive force in violation of the Fourth Amendment." *See Nolin v. Isbell,* 207 F.3d 1253, 1257 (11th Cir.2000). Here, even if the force applied by Pastor in effecting the arrest—forcing Durruthy down to the ground and placing him in handcuffs—was unnecessary, plainly it was not unlawful. The amount of force used was de minimus. In fact, the quantum of force used here was far less than our Court has sustained in other contexts. *See id.* at 1255 (finding force to be de minimus where an officer grabbed the plaintiff "from behind by the shoulder and wrist, threw him against a van three or four feet away, kneed him in the back and pushed his head into the side of the van, searched his groin area in an uncomfortable manner, and handcuffed him"); *see also Jones v. City of Dothan,* 121 F.3d 1456, 1460 (11th Cir.1997) (finding the force used to be minor where officers slammed the plaintiff against a wall, kicked his legs apart, required him to put his arms above his head, and pulled his wallet from his pants pocket).

Notably, Durruthy had not been restrained at the time the force was applied, distinguishing the instant case from two cases on which the district court relied. *See Ferraro,* 284 F.3d at 1191, 1198-99 (finding excessive force where the plaintiff was already handcuffed when an officer slammed her head on the car); *Priester v. City of Riviera Beach,* 208 F.3d 919, 927 (11th Cir.2000) (concluding that the force was excessive where a police officer released an attack dog on the plaintiff while the plaintiff was lying on the ground and the police officer's gun was pointed at the plaintiff's head). The pivotal question in this case is really whether the arrest

was lawfully founded on probable cause (or at least arguable probable cause). We are satisfied on this point. Moreover, on the facts presented here, we also find that the physical restraint and handcuffing of the Plaintiff was likewise lawful.[10] The force used to effect the Plaintiff's arrest was de minimus, not excessive under the Fourth Amendment. Because we find no constitutional violation, we need not address whether the constitutional right at issue was clearly established.

Accordingly, we reverse the district court's denial of the defense of qualified immunity and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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10. Durruthy also argues that the force used aggravated a pre- existing shoulder injury. We have observed, however, in a similar context that "[w]hat would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre- existing condition the extent of which was unknown at the time." *Rodriguez v. Farrell,* 280 F.3d 1341, 1353 (11th Cir.2002). On this record, there is no evidence that Pastor, before the arrest, had any knowledge of Durruthy's pre-existing condition.

Appendix A

STAHL, Circuit Judge, dissenting:

The defense of qualified immunity attempts to strike a balance between the need for a remedy to protect the rights of citizens from government excess and the need for government officials to be able to carry out their discretionary functions without fear of constant litigation. *GJR Investments, Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1366 (11th Cir.1998). In this case, we address the violation of a clearly established constitutional right by a police officer who had more than enough awareness of the surrounding circumstances to know that her arrest of plaintiff Albert Durruthy, and the force used in so doing, was not only unnecessary, but unlawful. Whether under a standard of probable cause or arguable probable cause to arrest, the facts of this case, made all the more apparent and troubling by videotape evidence of the arrest, preclude any notion that Officer Pastor, or any reasonable police officer, could have believed that probable cause to arrest existed. Qualified immunity is inappropriate here, especially at the summary judgment stage. Accordingly, with respect, I dissent. First, we must consider the threshold issue of whether Durruthy's allegations, if taken as true, establish a violation of his constitutional right against unlawful arrest under the Fourth Amendment of the federal Constitution. *See Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). The evidence shows that there simply was no reason for Durruthy's arrest. The videotape squarely refutes Pastor's initial stated basis for the arrest of Durruthy, which was allegedly his obstruction of an officer's arrest of Bruce Bernstein, an NBC cameraman, and his failure to obey another officer's order to leave the street. *See* Fla. Stat.

§ 843.02. There were no acts of civil obedience taking place and no protestors or moving vehicles in the street. Moreover, the police were not clearing the area in which Durruthy was filming. Pastor herself was standing in a line of officers approximately sixty feet away from Durruthy. She left the line, without the permission of any superior officer, and rushed over to Durruthy though she plainly saw that he was following another officer's direct order to "get off the street." She admitted that she was aware that Durruthy was a member of the press and saw that he was carrying a large television camera, but nonetheless helped pin him to the ground and forcibly secure him by wrenching his right arm behind his back and pressing his head to the sidewalk. Though Durruthy repeatedly pled with Pastor and the other officers that he would go peacefully and that his "bad arm" would not bend backward, Pastor and the other officers did not relent.

In addition, George Bouza—Durruthy's "sound man" who recorded audio of the events—approached the scene, attempted to inform the attending police officers, including Pastor, that he was Durruthy's partner, and convinced the officers to give him Durruthy's camera, which they had taken from Durruthy before forcing him to the ground. Yet, Pastor continued to pin Durruthy to the sidewalk and proceed with the arrest without regard to the obvious pain and injury she was inflicting even though Durruthy was neither resisting the officers nor presenting any danger. Pastor knew all of this. Thereafter, Durruthy was held in a police van without medical care for six hours before being released. A prudent officer with Pastor's knowledge of the situation, under the circumstances, could not have believed that Durruthy had committed, was committing, or was about to commit an offense which justified arrest.

Moreover, when Durruthy and his criminal defense attorney met with the State Attorney several weeks after the arrest, Durruthy's counsel showed the State Attorney the videotape of the arrest. The State Attorney immediately decided to drop all charges against Durruthy, and asked him to sign a release of liability in favor of the Miami Police Department and its officers. Durruthy refused to sign the release.

In a thoughtful opinion, the district court concluded that a reasonable jury could find that Pastor arrested Durruthy without probable cause. *See Durruthy v. City of Miami,* 235 F.Supp.2d 1291 (S.D.Fla.2002). The court further found that there was sufficient evidence to show that Pastor did not even have arguable probable cause, that is, there existed sufficient proof that "no reasonable police officer in the position of Pastor could have believed that there was probable cause to arrest Plaintiff." *Id.* at 1296- 97.

The majority's decision adopts Pastor's argument made to the district court that even if there was no probable cause or arguable probable cause to arrest Durruthy for obstructing or resisting the officers, there was probable cause or at least arguable probable cause to arrest him under Fla. Stat. § 316.30. The district court found this argument unconvincing because § 316.130 "is directed at preventing pedestrians from walking among vehicular traffic" and "there was no vehicular traffic in the roadway." *Durruthy,* 235 F.Supp.2d at 1298. The majority points out that the statute does not require that there be vehicular traffic in the roadway at the time of the offense and that it contains no exception for anyone, including members of the media. Indeed, Durruthy

acknowledges that he was not entitled to a special exception because he was a cameraman. The fact that he was a cameraman, however, and that he was performing his duties as a cameraman at the time of the arrest goes to the core of the qualified immunity analysis.

And that is where the district court is correct and the majority of this Court wrong with respect to Pastor's arguable probable cause to arrest under § 316.130. Again, the district court pointed out that "[t]he statute is directed at preventing pedestrians from walking among vehicular traffic." 235 F.Supp.2d at 1298. Notwithstanding what the statute does and does not require, "an arrest pursuant to § 316.130 could not be reasonable" given that at the time of the arrest, Pastor knew that "there was no vehicular traffic in the roadway" and that Durruthy was "an obvious member of the media acting within the scope of his journalistic duties." *Id.* In my view, the district court correctly analyzed the applicability of § 316.130 in terms of whether Pastor, *at the time of the arrest* and given her knowledge of the circumstances, had arguable probable cause to arrest based on § 316.130. The inquiry is not whether Durruthy actually violated the statute or whether the elements of the statute were met, but whether it was objectively reasonable for Pastor to arrest Durruthy given the obvious circumstances. Pastor's invocation of § 316.130 fails to amount even to an after-the-fact excuse for her actions. Durruthy was charged only with obstruction of an officer under Fla. Stat. § 843.02, and that charge was dropped immediately by the State Attorney upon viewing the videotape of the arrest. Pastor never articulated § 316.130 as the purported basis for the arrest at the time of the arrest and raised it as a justification for the arrest only after the

commencement of this litigation. Though I acknowledge that an arrest is not rendered invalid by the fact that the basis for the arrest, though legitimate, was merely pretextual, *see Whren v. United States,* 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), we should "be troubled by an argument suggesting that a legitimate basis for an arrest identified *only after* the arrest would provide sufficient grounds therefor." *Rogers v. Powell,* 120 F.3d 446, 453 n. 5 (3d Cir.1997) (emphasis added). Moreover, it is patently obvious to any observer of the videotape evidence that the sole reason for Pastor's conduct was that she and the other officers wanted Durruthy to stop filming the arrest of the NBC cameraman. No one has argued that the mere act of Durruthy's filming is a crime, unlike the scenarios in *Whren, United States v. Holloman,* 113 F.3d 192 (11th Cir.1997), and other cases cited by the majority where the officers' purported bases for arrest were obvious pretexts for suspicion of drug possession, murder, and other crimes.

The majority states that "[t]he heart of Durruthy's argument is that there was no probable cause for his arrest because he had permission to be in the street" and proceeds to discredit Durruthy's testimony as "vague, general, and stated at the highest order of abstraction." Given that the case is at the summary judgment stage, we must resolve all issues of material fact in favor of Durruthy before determining the legal question of whether the defendant is entitled to qualified immunity under Durruthy's version of the facts. *See Lee v. Ferraro,* 284 F.3d 1188, 1190 (11th Cir.2002). Durruthy's testimony on whether he had permission to be in the street still leaves a genuine issue of material fact as to whether Pastor was aware, with notice

that Durruthy (and the media overall) was authorized to be in the street, that she was violating a clearly established federal right when she arrested him. *See Penn v. City of Miami,* 1999 WL 1050059, *18 (S.D.Fla. Sept.7, 1999).

As to the issue of whether Durruthy's constitutional right against illegal arrest was "clearly established," the majority relies on this Circuit's "rigid gloss" of how exactly such a right is "clearly established." *Hope,* 536 U.S. at 739, 122 S.Ct. 2508. Durruthy has argued that Pastor's violation of a Miami Police Department internal policy shows Pastor's knowledge of the unlawfulness of her actions. The policy reads:

> No warrantless arrest of media personnel for non-felonious acts arising out of the pursuit of the news gathering function will be made without the express authority of the senior on-duty commanding officer or the staff duty officer. City of Miami's Office Bulletin # 00-4 dated January 14, 2000.

Chief of Police Raul Martinez explained that the Department's media policy granted a higher degree of courtesy to members of the media than to average citizens and that if a member of the media complies with a police officer's request to move, such compliance should be the end of the incident.

The majority claims that it cannot find any precedent that "even remotely suggests that the possible violation of an internal law enforcement guideline" defeats an official's

qualified immunity. *Hope,* however, a decision by the United States Supreme Court that directly addresses this Circuit's strict view of qualified immunity, stands in part on guidelines and regulations issued by law enforcement. Hope, an inmate assigned to Limestone Correctional Facility in Alabama, was twice handcuffed to a "hitching post" for several hours as punishment for disruptive behavior. This Court found that though "cuffing an inmate to a hitching post for a period of time extending past that required to address an immediate danger or threat is a violation of the Eighth Amendment," *Hope v. Pelzer,* 240 F.3d 975, 980 (11th Cir.2001), the defendant prison guards were still entitled to qualified immunity because "there was no clear, bright-line test established [at the time of the violation] that would survive our circuit's qualified immunity analysis." *Id.* at 981. This Court went on to explain that "it is important to analyze the facts in . . . [prior] cases, and determine if they are 'materially similar' to the facts in the case in front of us." *Id.* "[A]nalogous" facts, the Court concluded, are not enough. *Id.* Instead, the facts must be " 'materially similar' to Hope's situation." *Id.*

The Supreme Court reversed and rejected this Court's analysis and asserted that "this rigid gloss on the qualified immunity standard . . . is not consistent with our cases." *Hope,* 536 U.S. at 739, 122 S.Ct. 2508. The Court continued:

> officials can still be on notice that their conduct violates established law even in novel factual circumstances. . . . Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion

> that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts.... [T]he salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.

Id. at 741, 122 S.Ct. 2508.

The Court, as part of its analysis, considered (1) a regulation issued by the Alabama Department of Corrections (ADOC) and (2) a report and advisory letter issued by the U.S. Department of Justice to the ADOC before the incidents of Hope's mistreatment. The ADOC regulation authorized the use of the hitching post when an inmate refused to work or was otherwise disruptive to the prison work squad. It provided that an activity log should be completed for each such inmate, detailing his responses to offers of water and bathroom breaks every fifteen minutes. The regulation also stated than an inmate had to be released back into the work squad whenever he told an officer that he was ready to go back to work. The log was not completed for Hope's second shackling, which lasted for seven hours, and the evidence showed that the periodic offers contemplated by the regulation were never made to Hope. The evidence also showed that the regulation was frequently ignored for other prisoners. The Court concluded that the regulation and the fact that the prison guards "could ignore it with impunity" provided "strong support for the conclusion that they were fully aware of the wrongful character of their conduct." *Id.* at 744, 122 S.Ct. 2508.

In addition, the Court asserted that "its conclusion 'that a reasonable person would have known' [was] buttressed" by a report and letter sent to the ADOC from the U.S. Department of Justice in which the DOJ specifically advised that the systematic use of the hitching post constituted improper corporal punishment. *See id.* at 745, 122 S.Ct. 2508. The Court concluded that though the DOJ's views may not have been communicated to the prison guards, the "exchange lends support to the view that reasonable officials in the ADOC should have realized that the use of the hitching post under the circumstances alleged by Hope violated the Eighth Amendment prohibition against cruel and unusual punishment." *Id.*

The majority asserts that the existence of the Miami Police Department's internal guideline "does not undermine objective facts" surrounding the scene of the incident. Indeed, the guideline "does not convert an illegal act suddenly into a legal one." It does, however, bear strongly on Pastor's knowledge of the circumstances, of how she should act in such circumstances, and ultimately on the issue of whether a reasonable police officer with her knowledge would have probable cause to arrest Durruthy. Again, Pastor admits that she knew Durruthy was a member of the media. Her knowledge of the guideline put her on clear notice that she was not supposed to arrest a newsman without permission from a supervising officer. As the district court correctly assessed, "When an obvious member of the media approaches a police officer in a cleared street, is instructed to return to the sidewalk, and complies with the instruction, a police officer should be aware that a custodial arrest based on interference with a police officer is illegal." 235 F.Supp.2d

at 1298. It is on these objective facts that the Miami PD's internal guideline sheds additional light in favor of finding against qualified immunity at the summary judgment stage. Notwithstanding the issue of whether and how much notice the Miami PD's internal guideline provided, this case is very similar to *Holmes v. Kucynda,* 321 F.3d 1069 (11th Cir.2003), where Atlanta police arrested the plaintiff, Holmes, for constructive possession of cocaine and marijuana. At the time of the arrest, the police had reason to believe that Holmes was just a visitor in the apartment where the drugs were discovered. She specifically informed the officers that she did not reside in the apartment, her suitcases still had clothes in them, her toiletry items were found in a travel bag, and her driver's license indicated that she lived in Norcross, Georgia. *Id.* at 1081. Other than her mere presence in the house, the evidence showed nothing from which to infer that Holmes had knowledge of, control or dominion over, the drugs. *See id.* Thus, there was reason to know that she was not in possession of the drugs. In reversing the district court's award of summary judgment to the arresting officers, this Court observed that similar reported cases need not be identified after *Hope. Id.* at 1078. Under the Eleventh Circuit's "arguable probable cause" standard, this Court inquired, taking the facts in the "light most favorable to Holmes," *id.* at 1081, whether a reasonable officer would have known there existed no arguable probable cause to make the arrest. The Court held that "it was not even arguably reasonable for Officer Rolfe to arrest Holmes for constructive possession of illegal contraband." *Id.* Hence, qualified immunity was not proper at the summary judgment stage. The unique facts here on their own establish the egregiousness and illegality of Officer Pastor's conduct.

Appendix A

Pastor "did not need specific case law to give her fair warning that an arrest in these circumstances could violate Plaintiff's Fourth Amendment rights." *Durruthy*, 235 F.Supp.2d at 1298. The majority opinion sets the bar prohibitively high and tips the balance contemplated by qualified immunity away from the Constitution. Aggrieved individuals will have less incentive to challenge unwarranted and unconstitutional government actions because monetary compensation for their harms is unavailable. In the end, unconstitutional government action is more likely to go unchallenged and unchanged. That is our ultimate concern.

Hence, in my view, the district court did not err by denying Pastor qualified immunity at the summary judgment stage and I would affirm that decision.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION DATED DECEMBER 13, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 01-4155-CIV-MORENO

Dec. 13, 2002

Albert DURRUTHY,

Plaintiff,

v.

THE CITY OF MIAMI, Raul Martinez, as Chief of Police, and Officer Jennifer Pastor, individually,

Defendants.

ORDER DENYING OFFICER JENNIFER PASTOR'S MOTION FOR SUMMARY JUDGMENT

MORENO, District Judge.

Plaintiff is a television cameraman who was arrested on April 22, 2000 in Miami, FL during the protests surrounding the Elian Gonzalez affair. Plaintiff has sued the City of Miami, its Chief of Police, and the arresting officer for violations of his constitutional rights and state law assault,

battery and false arrest. Before the Court is Officer Pastor's Motion for Final Summary Judgment. For the reasons set forth below, the motion is DENIED.

I. BACKGROUND

The relevant facts of this case are mostly undisputed, thanks in large part to a videotape that captured Plaintiff's arrest on April 22, 2000. On that day, protesters gathered in downtown Miami to voice displeasure over the United States government's decision to return Elian Gonzalez to Cuba. Government officials had removed Gonzalez from his uncle's house at approximately 5:30 a.m. that morning.

Because of the demonstrations, Flagler Street in downtown Miami was shut off to vehicular traffic and surrounded by barricades. Police officers were also attempting to move the protestors from the street to the sidewalk. By 11:00 a.m., the police had cleared the demonstrators from the street at the intersection of Flagler Street and 27th Ave.

At approximately 11:00 a.m., the police arrested cameraman Bruce Bernstein for unknown (and irrelevant) reasons near the intersection of Flagler Street and 27th Ave. After arresting and handcuffing Bernstein, the police escorted him through the middle of the cleared street towards a paddy wagon. Plaintiff, a freelance cameraman who was filming the protests on assignment, stepped into the street in an attempt to film the arrest of Bernstein. As Plaintiff approached, the police officer who was in the process of arresting Bernstein instructed Plaintiff to return to the

sidewalk.[1] Plaintiff immediately began walking backwards to the sidewalk. He continued to film. After he began walking backwards, the police officer who had told him to get out of the street rushed towards him and arrested him. Another officer, Jennifer Pastor, approached him from behind.

After grabbing Plaintiff, the two officers forced him to his stomach and kneeled on his back. The officers then pulled his arms behind him and secured his wrists. Plaintiff pleaded with the officers to be gentler with his arms because his shoulder was hurt. He also stated "I am going peacefully, Sir." Upon being handcuffed, the officers pulled Plaintiff to his feet by his arms. The police then removed what appears from the tape to be a gas mask.

Plaintiff's amended complaint contains four counts against the City of Miami, Chief of Police Raul Martinez in his official capacity, and Officer Pastor based on: (1) violations of Plaintiff's Fourth Amendment rights to be free from an unreasonable arrest and excessive force; (2) state law assault; (3) state law battery; and (4) state law false arrest. Pastor has moved for summary judgment on all four counts.

II. LEGAL STANDARD

Summary judgment is authorized when there is no genuine issue of material fact. Fed.R.Civ.P. 56(c). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact.

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1. This officer was not named in this lawsuit. To this day Plaintiff does not know who he was.

Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The party opposing the motion for summary judgment may not simply rest upon mere allegations or denials of the pleadings; the non-moving party must establish the essential elements of its case on which it will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The nonmovant must present more than a scintilla of evidence in support of the nonmovant's position. A jury must be able reasonably to find for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

III. ANALYSIS

A. § 1983 Claims

Plaintiff has alleged that Pastor, one of the two arresting officers, violated his constitutional rights under the Fourth Amendment. Pastor argues that the Court should grant summary judgment in her favor because she is entitled to qualified immunity. The Court disagrees.

The defense of qualified immunity shields a government official from § 1983 liability for harms arising from the official's discretionary acts, so long as the discretionary acts do not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. *Vinyard v. Wilson*, 311 F.3d 1340, 1346-47 (11th Cir.2002). This defense attempts to strike a balance between the need for a remedy to protect the rights of citizens and the

need for government officials to be able to carry out their discretionary functions without fear of constant litigation. *GJR Investments, Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1366 (11th Cir.1998).

In order to receive qualified immunity, a defendant must first prove that he was acting within the scope of his discretionary authority. *Lee v. Ferraro,* 284 F.3d 1188, 1194 (11th Cir.2002). Once the defendant establishes that he was acting within his discretion, the burden shifts to the plaintiff to show that qualified immunity should not be applied. *Id.* To do so, the plaintiff must satisfy a two-part test. First, the court must ask whether the defendant violated plaintiff's constitutional rights under the plaintiff's version of the facts. *Vinyard,* 311 F.3d 1340 (citing *Hope v. Pelzer,* 536 U.S. 730, 122 S.Ct. 2508, 2513, 153 L.Ed.2d 666 (2002) and *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). If the plaintiff can establish a violation, the court must determine whether the constitutional rights were "clearly established" under the law at the time of the incident. *Id.* In making the determination of whether the law was clearly established, "the salient question" is whether the law provided the official with sufficient warning that her alleged actions were unconstitutional. *Hope,* 536 U.S. 730, 122 S.Ct. at 2516; *Vinyard,* 311 F.3d at 1349. In this case, Plaintiff does not dispute that Pastor was acting within her discretion. Plaintiff argues that Pastor violated his clearly established constitutional rights under the Fourth Amendment by arresting him without probable cause and by subjecting him to excessive force. Thus, the Court must consider, first, whether Plaintiff's rights were violated. If the Court finds a

violation, the Court then considers whether the law was clearly established at the time of the arrest so as to put Pastor on notice that her conduct violated Plaintiff's rights.

1. Probable Cause

Plaintiff argues that Pastor violated his constitutional rights by arresting him without probable cause. An arrest without probable cause violates the right to be free from unreasonable searches under the Fourth Amendment. *Redd v. City of Enterprise,* 140 F.3d 1378, 1382 (11th Cir.1998). Probable cause exists where an arrest is objectively reasonable based on the totality of the circumstances. *Rankin v. Evans,* 133 F.3d 1425, 1435 (11th Cir.1998). This standard is met when the facts and circumstances presented to an officer "would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing or is about to commit an offense." *Id.* (quoting *Williamson v. Mills,* 65 F.3d 155, 158 (11th Cir.1995).

To raise a valid qualified immunity defense, however, a police officer need only have had *arguable* probable cause to arrest the plaintiff. *Jones v. Cannon,* 174 F.3d 1271, 1283 (11th Cir.1999). Arguable probable cause means that a reasonable police officer in the defendant's position could have believed that probable cause existed. *Lee,* 284 F.3d at 1194. It is the plaintiff's burden to prove the absence of arguable probable cause. *Rankin,* 133 F.3d at 1436. Thus, to show that his rights have been violated, Plaintiff must prove that no reasonable police officer in the position of Pastor could have believed that there was probable cause to arrest Plaintiff.

According to Pastor, arguable probable cause existed because Plaintiff interfered with the police by walking out into the street while the police were trying to clear the street. This conduct, explains Pastor, clearly violated § 843.02, Fla. Stat., which makes it a misdemeanor to "resist, obstruct, or oppose any officer . . . without offering or doing violence to the person of the officer. . . ." Under both Florida and federal law, committing a misdemeanor in the presence of a police officer creates probable cause for arrest. *Lee,* 284 F.3d at 1196 (citing Fla. Stat. Ann. § 901.15(1) and *Atwater v. City of Lago Vista,* 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001)); *see also Post v. City of Ft. Lauderdale,* 7 F.3d 1552, 1559 (11th Cir.1993) (finding arguable probable cause for an arrest based on § 843.02, Fla. Stat., where the facts showed that the plaintiff kept talking after the officer told him to be quiet, and that the officer had been told earlier that the plaintiff had previously resisted an arrest with violence).

After being arrested, Plaintiff was charged with violating § 843.02. However, so long as Pastor had probable cause to arrest Plaintiff for *any* offense she is shielded by qualified immunity. *Bailey v. Board of County Comm'rs of Alachua County,* 956 F.2d 1112, 1119 n. 4 (11th Cir.1992). Accordingly, Pastor submits as alternative bases for probable cause various alleged violations of the traffic laws concerning pedestrians in the streets. Section 316.130, Fla Stat., for example, makes it unlawful for a pedestrian to "walk along and upon the portion of a roadway paved for vehicular traffic." Similarly, § 54-2 of the Miami City Code makes it unlawful for any person to "walk upon any street or sidewalk in the city so as to obstruct free passage ... after a request by

a law enforcement officer to move on so as to cease blocking or obstructing free passage." Section 316.072, Fla. Stat. also makes it a misdemeanor "for any person to willfully fail or refuse to comply with any lawful order or direction of any law enforcement officer [with respect to the traffic laws]." The Court must therefore consider these laws in relation to the facts of this case and must decide if Pastor had arguable probable cause to arrest Plaintiff based on any of them. As for § 843.02, the videotape submitted to the Court shows that Plaintiff did indeed enter the street during the protest, and it was obvious that the street had been cleared of pedestrians. The tape also shows, however, that as soon as the police instructed Plaintiff to return to the sidewalk he immediately obeyed. Plaintiff walked backwards slowly in the direction of the sidewalk. It was while he was retreating that Pastor arrested him. Thus, Plaintiff clearly complied with the instruction of the police officer to some extent. It is true, of course, that Plaintiff did not stop filming and did not move quickly. The question is whether Plaintiff's slow movement and continued filming could have given rise to the impression that he was resisting, obstructing, or opposing the officer. After viewing the tape, the Court will not find that it reasonably could have. Plaintiff was told to return to the sidewalk. He began moving in that direction. The fact that he continued to film and did not move as quickly as possible does not make an arrest for resisting, obstruction, or opposing an officer reasonable. Accordingly, the Court cannot find that Pastor had arguable probable cause for the arrest based on § 843.02.

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The Court also finds that the traffic statutes identified by Pastor as alternative bases for an arrest do not suffice. First, § 316.072, Fla. Stat. and § 54-2 of the Miami City Code specify that a person is in violation when he fails or refuses to comply with an order or direction of a law enforcement officer. Plaintiff in this case, however, *did* comply by walking backwards toward the sidewalk. He may not have moved fast enough for the officers' liking, but he complied nonetheless. As for § 316.130, Fla. Stat., the Court concludes that no arguable probable cause existed under the totality of the circumstances. The statute is directed at preventing pedestrians from walking among vehicular traffic. In this case, however, there was no vehicular traffic in the roadway. Further, Plaintiff was not a pedestrian in the normal sense of the word but an obvious member of the media acting within the scope of his journalistic duties. Under these circumstances, an arrest pursuant to § 316.130 could not be reasonable. The Court therefore finds sufficient evidence that Pastor violated Plaintiff's Fourth Amendment rights to be free from an arrest without probable cause.

Furthermore, the Court finds that the law regarding probable cause was clearly established at the time of the arrest so as to give Pastor fair warning that her actions were illegal. While the Court notes that the "clearly established" standard is often a difficult one for plaintiffs to satisfy (and rightfully so), the Court also acknowledges that "such fair and clear notice can be given in various ways." *Vinyard,* 311 F.3d at 1350-51 (emphasis omitted). Specific case law applicable to the particular facts of a case is not always required. Instead, broad statements of the law made in certain factual situations may apply "with obvious clarity" to later factual

circumstances. *Id.* In those cases the precise facts surrounding the conduct are immaterial to the violation. *Id.* Moreover, in other cases the conduct may be so obviously a violation of constitutional rights that precedential case law does not even factor into the analysis. Conduct may be "so bad that case law is not needed to establish that the conduct cannot be lawful." *Id.*

After reviewing the record in this case and viewing the videotape of Pastor's conduct, the Court notes the unique facts in this case and acknowledges the lack of specific case law from the Eleventh Circuit or Supreme Court to put Pastor on notice of the legal constraints of her actions. Nevertheless, the Court finds that the conduct was obviously illegal, based on the complete lack of any reasonable basis for the arrest. When an obvious member of the media approaches a police officer in a cleared street, is instructed to return to the sidewalk, and complies with the instruction, a police officer should be aware that a custodial arrest based on interference with a police officer is illegal. After Plaintiff began complying with the officer's instruction, the only conduct that Pastor could base the arrest on was the fact that Plaintiff continued to film and walked slowly. Pastor did not need specific case law to give her fair warning that an arrest in these circumstances could violate Plaintiff's Fourth Amendment rights. Therefore, the Court will not grant her qualified immunity.

2. Excessive Force

Plaintiff also argues that Pastor used excessive force when she arrested him. "In order to determine whether the

amount of force used by a police officer was proper, a court must ask 'whether a reasonable officer would believe that this level of force is necessary in the situation at hand.' " *Lee,* 284 F.3d at 1197 (quoting *Willingham v. Loughnan,* 261 F.3d 1178, 1186 (11th Cir.2001)). As the Eleventh Circuit recently explained:

> The Supreme Court has established that, in order to balance the necessity of using some force attendant to an arrest against the arrestee's constitutional rights, a court must evaluate a number of factors, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Lee, 284 F.3d at 1198 (citing *Graham v. Connor,* 490 U.S. 386, 394-95, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) and *Leslie v. Ingram,* 786 F.2d 1533, 1536 (11th Cir.1986)). A review of Eleventh Circuit case law applying this standard reveals that court's regular acceptance of a police officer's use of some force when making a custodial arrest. In *Nolin v. Isbell,* 207 F.3d 1253, 1255 (11th Cir.2000), for example, the plaintiff was arrested after the officer believed that the plaintiff was in a physical fight with another individual. The police officer "grabbed him from behind by the shoulder and wrist, threw him against a van three or four feet away, kneed him in the back and pushed his head into the side of the van, searched his groin area in an uncomfortable manner, and handcuffed him." *Id.* The court found that this force was *de minimus* and concluded that "the application of *de minimus*

force, without more, will not support a claim for excessive force in violation of the Fourth Amendment." *Id.* at 1257.

In *Jones v. City of Dothan, Ala.*, 121 F.3d 1456 (11th Cir.1997), the police arrested the plaintiff believing that he had harassed and chased a woman earlier that day. The officers "slammed" the plaintiff's head against a wall, kicked his legs apart, required him to put his arms above his head, and pulled his wallet from his pants pocket. The court applied qualified immunity to the officers, finding that "[w]hile use of force against [the plaintiff] may have been unnecessary, the actual force used and the injury inflicted were both minor in nature." *Id.* at 1460.

In *Post v. City of Fort Lauderdale*, 7 F.3d 1552 (11th Cir.1993), the police arrested a restauranteur for repeated violations of the building and health codes. The police officer, who knew that the arrestee had previously been arrested for resisting arrest, placed him against a display case, applied a choke hold, and handcuffed him. *Id.* at 1556. Afterwards, the arrestee made a remark, and the officer pushed him. The court found that "the amount of force [the officer] used, even if unnecessary, was enough to violate the law was not plain; reasonable doubt existed, and still exists, on whether this amount of unnecessary force was unlawful." *Id.* at 1560.

In this case, the force used by the officers was not clearly more violent than in *Nolin*, *Jones*, and *Post*. The officers shoved Plaintiff to the ground, kneeled on his back, wrenched his arms behind his back and secured his wrists with handcuffs. The officers then pulled him up by his arms. When standing, another officer pulled his mask off his face.

Nonetheless, while officers certainly have some leeway in applying force, courts must always consider the offense for which the plaintiff was arrested. A less serious offense permits less force during an arrest. Thus, in *Lee,* the plaintiff was arrested for honking her car horn at a vehicle in her traffic lane, 284 F.3d at 1191. After handcuffing the plaintiff, the officer "shoved" her against the car. The Eleventh Circuit found that arguable probable cause existed for the arrest, but declined to apply qualified immunity on plaintiff's excessive force claim. *Id.* at 1200. The court found that the force was "plainly excessive, wholly unnecessary, and, indeed, grossly disproportionate under *Graham.*" *Id.* at 1199 (citing *Graham,* 490 U.S. at 396, 109 S.Ct. 1865). The court also distinguished previous cases because "the crime at issue in this case was undeniably less significant that the crimes in any of the other cases we have considered." *Id.*

Police officers necessarily use force during an arrest to protect themselves and others from threats posed by the arrestee. Where that threat is minimal or nonexistent, however, the officer must tailor her actions accordingly. *See Thornton v. City of Macon,* 132 F.3d 1395, 1400 (11th Cir.1998) (per curiam). In *Thornton,* the police responded to a domestic dispute. After lying to obtain entry into the plaintiff's home, the police grabbed plaintiff's arms and neck, threw him to the floor, cuffed his hands behind his back and dragged him outside. *Id.* at 1398. The district court denied the officers' summary judgment motions and the Eleventh Circuit affirmed. The court concluded both that no arguable probable cause existed and that the police used excessive force. As for the excessive force claim, the court noted that the plaintiff was not "suspected of having committed a serious

crime, neither posed an immediate threat to anyone, and neither actively resisted arrest ... Under the circumstances, the officers were not justified in using *any* force, and a reasonable officer would have recognized that the force used was excessive." *Id.* at 1400.

Further, courts must take into account the arrestee's behavior during the incident. That is, how did the arrestee respond to the police? Where, as here, the arrestee fully cooperates, a small amount of force may be less reasonable. In *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919 (11th Cir.2000), the plaintiff was a suspect in a burglary at a golf shop. When the police confronted the plaintiff, they instructed him to lay down. Plaintiff complied. The facts revealed that the plaintiff did not pose a threat of bodily harm to the officers or to anyone else. He was not attempting to flee. Nevertheless, the officer released his attack dog on the plaintiff while he was laying down and let the dog attack him for at least two minutes. The Eleventh Circuit found that "[n]o reasonable police officer could believe that this force was permissible given these straightforward circumstances." *Id.* 927.

Here, Plaintiff was a member of the media who was arrested in the street during a protest. As he approached the police officer in the street, carrying his camera, it would have been clear to anyone that he was a journalist. Obviously he was not a danger to the police officers or anyone else. He himself was not even protesting—he was merely filming another cameraman's arrest. It appears from the videotape that he was arrested because he continued to film as he walked back to the sidewalk. Thus, the only danger facing Pastor and the other police officers was to their reputation on account of Plaintiff's footage.

Appendix B

Plaintiff also fully complied with the officer's requests and instructions. When motioned back to the sidewalk he immediately started in that direction. Moreover, when Pastor began physically securing Plaintiff, he clearly stated "I am going peacefully!" Thus, Pastor was faced with a situation in which force was unnecessary. Pastor nonetheless forced him down to the ground, used her knee to hold him face down on the sidewalk, and pulled his arms behind his back. In light of the circumstances, the force applied was illegally disproportionate.

Finally, the Court also finds that at the time of the arrest it was clearly established that Pastor's conduct constituted excessive force. While Plaintiff has identified no controlling and factually similar case that covers the precise situation in this case, Pastor's conduct brings this case within the category of cases in which the unlawfulness of the conduct is "readily apparent even without identifying caselaw." *Smith v. Mattox*, 127 F.3d 1416, 1420 (11th Cir.1997). It was completely unnecessary for Pastor to use *any* force in arresting Plaintiff. Not only was Plaintiff not fleeing and not a danger to Pastor or others, Plaintiff complied with instructions from the police. In addition, Plaintiff clearly and audibly stated that he was "going peacefully." Despite these circumstances, Pastor ran at Plaintiff, forced him to the ground, held him down by kneeling on his back, wrenched his arms behind him, and handcuffed him.

Pastor's conduct violated the "clear and obvious principle that once an arrest has been fully secured and any potential danger or risk of flight vitiated," a police officer cannot employ "severe and unnecessary force." *Lee*, 284 F.3d

at 1200. Where a principle is "clear and obvious," an officer cannot argue that she had no warning that her conduct was verboten. Pastor is thus not entitled to qualified immunity.

B. State Law Claims

Pastor has also moved for summary judgment on Plaintiff's claims under Florida law for assault, battery, and false arrest. In light of the Court's findings above, however, the Court need not pause long to deny the motions.

First, as for the assault and battery claims, a jury question is created by a police officer's use of arguable excessive force while effectuating an arrest. *City of Homestead v. Suarez,* 591 So.2d 1125, 1125 (Fla. 3d DCA 1992). As the Court has found that Pastor used arguably excessive force in this case, summary judgment is inappropriate on these claims. Second, as for the false arrest claim, Pastor has argued that the claim is barred because she had probable cause for the arrest. The Court has found that based on the record before it no such probable cause existed. Summary judgment is therefore unwarranted on this claim as well.

IV. CONCLUSION

Plaintiff has satisfactorily demonstrated that Pastor violated his Fourth Amendment constitutional rights by arresting him without probable cause and by using excessive force during the arrest. As a result, Plaintiff has also created an issue for the jury on his state law claims for assault, battery, and false arrest. It is therefore

Appendix B

ADJUDGED that Officer Pastor's Motion for Final Summary Judgment (D.E. No. 41), filed on *August 16, 2002* is DENIED.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 10, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-17017-FF

ALBERT DURRUTHY,

Plaintiff-Appellee,

versus

CITY OF MIAMI, et al.,

Defendants,

JENNIFER PASTOR, Officer, individually,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 1985 ____F.2d____)

Before: HULL, MARCUS and STAHL*, Circuit Judges.

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* Honorable Norman H. Stahl, United States Circuit Judge for the First Circuit, sitting by designation.

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
JUL 5 - 2004
OFFICE OF THE CLERK

No. 03-1522

IN THE

Supreme Court of the United States

ALBERT DURRUTHY,

Petitioner,

v.

OFFICER JENNIFER PASTOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Eleventh Circuit failed to follow *Hope v. Pelzer*, 536 U.S. 730 (2002)?

II. Whether the Eleventh Circuit exceeded its jurisdiction by reevaluating the sufficiency of the evidence in a qualified immunity appeal?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Albert Durruthy and Respondent Officer Jennifer Pastor. The City of Miami has been served as an interested party.

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STATEMENT OF THE CASE

The Petitioner's statement of the case does not adequately describe the facts. We rely on the facts as stated in the opinion of the circuit court:

> The relevant facts are straightforward. On April 22, 2000, United States government officials removed a young boy, Elian Gonzalez, from his uncle's house to facilitate the boy's return to his father in Cuba. The reaction in some parts of Miami was immediate and violent. Protestors took to the streets and, as the Plaintiff said, "that was the day of the riots in Miami." Durruthy Dep. at 17. Some people threw trash bins into the streets and set them on fire. Others threw bottles, rocks, and broken glass. At the major intersection of N.W. 27th Avenue and Flagler Street (one of the intersection's roads has six lanes, the other four), the scene was chaotic during some of the morning. Police were trying to clear the intersection of people and cars. Protesters were arrested at that location. Many cameramen were on hand, including Durruthy.
>
> By Durruthy's account, he knew that Miami police officers were trying to clear the street. He observed that throughout the day he was "shooting officers arresting protesters, clearing the street, and I was shoulder to shoulder with these officers. And officers would grab me and say please, once you get your shot, please go back from the street, from tear gas, from launching tear gas, from arresting protesters." Durruthy Dep. at 78.

By 11:00 a.m. the intersection of Flagler Street and N.W. 27th Avenue was shut off to vehicular traffic, and police officers had cleared the demonstrators from the street. At that time, the police arrested a cameraman, Bruce Bernstein ("Bernstein"), and escorted him through the middle of the cleared street. Durruthy, a freelance cameraman who was on assignment to film the protests, ran into the street to film Bernstein's arrest up close.

The scene that followed was captured on a series of videotapes filmed by different people (including Durruthy) and from different locations. While Durruthy was filming Bernstein's arrest in the street, an officer instructed Durruthy to get out of the street. Durruthy backpedaled toward the sidewalk, while continuing to film Bernstein's arrest. As Durruthy approached the sidewalk, Officer Pastor grabbed him from behind. Pastor and another officer then pulled Durruthy onto the ground, while struggling to pin his arms behind him and handcuff him. During the struggle, the other officer also kneed Durruthy in the back. Durruthy stated, "Sir, my arm . . . please sir . . . I am going peacefully, sir." Pastor held Durruthy down with her hands, while the other officer tied Durruthy's arms behind his back with flex cuffs. Officer Pastor testified that whenever anyone is being arrested, she assumes that the person is armed with a weapon. She also said that she had never seen the Plaintiff before the day of his arrest.

> In a sworn declaration, Durruthy said that during the morning of April 22 other police officers let him enter the street, film his "shot," and return to the sidewalk on several occasions. He further stated that he had followed this procedure "countless" times during the previous four months without incident and with the permission of police. In his deposition, Durruthy testified that throughout that morning he had filmed officers arresting protestors and clearing the streets, and the officers had requested that he move out of the street once he got his "shot." Durruthy did not detail any of the specific circumstances surrounding these earlier incidents, nor did he identify any officer by name. Notably, however, Durruthy does not contend that Pastor allowed him to enter the streets at any time that day or in the past.

Durruthy v. Pastor, 351 F.3d 1080, 1084-85 (11th Cir. 2003).

Petitioner claims that "the police were *not* trying to clear the street/intersection on which Mr. Durruthy was filming." (Petition, at 3, emphasis in original). This is not correct. Officer Pastor testified that "we were trying to clear the intersection." (R3-59-17-18). Durruthy himself admitted this. He acknowledged that he knew that the officers were trying to clear the street, but still went out into the road. (R2-47-76-78).

The district court denied Officer Pastor's motion for summary judgment based on qualified immunity, but the circuit court reversed.

REASONS FOR DENYING THE PETITION

This petition involves no great issue of law. It instead involves the assertion that the circuit court reached the wrong result in deciding a qualified immunity appeal in a civil rights case.

I. There is no basis for certiorari based on alleged conflict with *Hope v. Pelzer*, 536 U.S. 730 (2002), since *Hope* applies when law is "clearly established" after there is a constitutional violation, but in this case there was no constitutional violation

The claim that the circuit court failed to follow *Hope v. Pelzer*, 536 U.S. 730 (2002), is not a reason for the Court to exercise its discretionary jurisdiction.

First, this argument actually alleges the misapplication of well-established law. Such a claim is not appropriate for discretionary review.

Second, the Petitioner devotes the heart of his petition to his claim that his right to not be improperly arrested and to be subjected to excessive force under the facts of this case was "clearly established." (Petition, at 6 to 9). But this issue was not resolved by the circuit court.

Under the law of qualified immunity, a court is to first determine whether the officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

> If no constitutional right would have been violated were the allegations established, there is no

> necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.

Id. at 201.

Here, the circuit court found that there was no constitutional violation. That is, it found that (1) there was probable cause for the arrest, and (2) the use of force was not excessive. There was thus no constitutional violation. *See Durruthy v. Pastor*, 351 F.3d at 1092, 1094 ("we believe Pastor had probable cause to arrest Durruthy"; "The force used to effect the Plaintiff's arrest was . . . not excessive under the Fourth Amendment.").

Since there was no constitutional violation, there is no issue concerning whether the law was "clearly established." Indeed, the circuit court noted on the excessive force claim that "[b]ecause we find no constitutional violation, we need not address whether the constitutional right at issue was clearly established." 351 F.3d at 1094-95. On the arrest claim, the circuit court stated in dicta that "even if Durruthy had actually alleged the violation of a constitutional right, such a violation was not clearly established." 351 F.3d at 1092. But this statement was pure dicta, and no basis for Supreme Court discretionary jurisdiction.

In short, the petition for certiorari is focused on the question of whether the circuit court properly decided when law is "clearly established." But since there was no constitutional violation, the "clearly established" issue is never properly reached. There is no basis for certiorari.

Finally, to the extent that the circuit court discussed in dicta when law is "clearly established," the court properly followed *Hope v. Pelzer*. The Petitioner claims that the circuit court misread this Court's instruction that an officer can be denied qualified immunity even when there is no materially similar case having held the conduct to have been unconstitutional. In fact, the circuit court opinion acknowledged this:

> No caselaw gave Pastor fair warning that she would be charged with the knowledge that other officers previously allowed Durruthy to film in the street, or that she somehow lacked probable cause to arrest Durruthy for violating § 316.130 because of that "permission." *See Williams v. Consol. City of Jacksonville*, 341 F.3d 1261, 1270 (11th Cir. 2003) (noting that in determining whether the unlawfulness of an official's actions was clearly established, "the salient question . . . is whether the state of the law [at the time of the unconstitutional act] gave [the official] fair warning that [her] alleged treatment of [the plaintiff] was unconstitutional" (quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002)).

351 F.3d at 1092-93. The circuit court properly stated the law.

II. The claim that the Eleventh Circuit exceeded its jurisdiction by improperly evaluating evidence is not a reason for the Court to grant certiorari

The Petitioner's second argument, although phrased in terms of jurisdiction, is simply a complaint about the circuit court's view of what facts were established in the record. This is not a basis for this Court's discretionary review.

The law governing appellate review of rulings on qualified immunity has been established. *See Johnson v. Jones*, 515 U.S. 304 (1995); *Behrens v. Pelletier*, 516 U.S. 299 (1996). There is no need for explication or clarification of the law by this Court. We *know* what the law is.

The Petitioner's argument, instead, is that the circuit court improperly viewed the evidence. But even the Petitioner acknowledges that "factual disputes do not warrant the exercise of this high Court's jurisdiction." (Petition, at 15). It is not the function of the Supreme Court to determine whether a circuit court erred in viewing the record in a particular case.

Furthermore, the circuit court did not exceed its jurisdiction in deciding this case. The Petitioner claims that the circuit court improperly viewed the evidence concerning whether he "entered the intersection with the express permission of the police." (Petition, at 14-15). But the circuit court merely noted what the evidence established, viewed in the light most favorable to the Petitioner: that the Petitioner had been permitted by some police officers to move into the street, get his picture, and then return to the sidewalk. 351 F.3d at 1085. However, there was no evidence that the Respondent, Officer Pastor, allowed the Petitioner to do this.

Id. Based on these undisputed facts, the circuit court made a legal analysis: that under the facts known to Officer Pastor, and the controlling Florida statute, the officer had probable cause to arrest the Petitioner. Furthermore, the fact that some officers may have given the Petitioner permission to go into the street did not mean that Officer Pastor lacked probable cause to arrest based on violation of a Florida statute barring people from going into the street. 351 F.3d at 1090-91.

Finally, *Johnson v. Jones*, 515 U.S. 304, does not stand for the proposition that the circuit court is barred from reviewing the record to determine the facts. Here, the district court made no finding on the claim that the Petitioner had "permission" to be in the street. The district court never addressed the point in its opinion. Under these circumstances, the circuit court had the right—indeed, the obligation—to consider the factual basis of the argument, viewing the facts in the light most favorable to the Petitioner. *See Johnson v. Jones*, 515 U.S. at 319 (where district court does not state facts it assumed, "a court of appeals may have to undertake a cumbersome review"). *See also Brown v. Armenti*, 247 F.3d 69, 77-78 (3d Cir. 2001); *Colston v. Colston*, 146 F.3d 282, 284-85 (5th Cir. 1998); *Hoard v. Sizemore*, 198 F.3d 205, 220 (6th Cir. 1999); *Stanley v. City of Dalton*, 219 F.3d 1280, 1286-87 (11th Cir. 2000).

CONCLUSION

There is no basis for granting certiorari. Since there was no constitutional violation, and thus no violation of clearly established law, there is no conflict with *Hope v. Pelzer*. The circuit court did not improperly review the evidence, and there is no conflict with *Johnson v. Jones*. The petition for certiorari should be denied.

Respectfully submitted,

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JUN 1 2 2004

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No. 03-1522

IN THE

Supreme Court of the United States

ALBERT DURRUTHY,

Petitioner,

v.

JENNIFER PASTOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

ALBERT DURRUTHY,

Petitioner,

v.

JENNIFER PASTOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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MOTION OF THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the National Press Photographers Association, the Radio-Television News Directors Association, the Reporters Committee for Freedom of the Press, and the Society of Professional Journalists hereby move for leave to file the accompanying brief as *amici curiae* in support of petitioner.

The National Press Photographers Association is a non-profit professional organization dedicated to the advancement of photojournalism, its creation, editing and distribution, in all news media. The NPPA vigorously promotes freedom of the press in all its forms. The NPPA's more than 10,000 members include still and television photographers, editors, students and representatives of businesses that serve the photojournalism industry.

The Radio-Television News Directors Association is a professional association devoted to electronic journalism. The RTNDA's more than 3,000 members include local and network news executives, educators, students, and others in the radio, television, cable and other electronic media worldwide.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedoms of information interests of the news media. The RCFP has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, the Society promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Each of the *amici curiae* has a strong interest in this case, which raises important questions concerning the First Amendment rights of the press to engage in newsgathering activities. The Petitioner, Albert Durruthy, a free-lance cameraman, was filming events in downtown Miami after federal officials removed Elián González from his uncle's home. While Durruthy was filming the arrest of another cameraman, police officers tackled and arrested him. Durruthy brought this suit under 42 U.S.C. § 1983 alleging violations of his constitutional rights against one of those officers and the City of Miami. The officer moved for summary judgment on the basis of qualified immunity, which the trial court

denied. On appeal, however, the Eleventh Circuit reversed.

The Eleventh Circuit's decision is inconsistent with this Court's prior ruling in *Hope v. Pelzer*, 536 U.S. 730 (2002). Furthermore, the Eleventh Circuit's decision, which shields a government official from liability for improper conduct motivated solely to prevent newsgathering, will have a chilling effect on First Amendment rights. This Court has recognized that newsgathering is a necessary antecedent to news reporting, and therefore is protected by the First Amendment. When government officials restrict the press in its ability to gather news, as occurred in this case, the result is to limit the news itself.

Petitioner has consented to the filing of this brief, and a letter of consent from Petitioner's counsel has been filed with the Clerk. This motion is necessary because Respondent has refused to consent to the filing of this brief.

Respectfully submitted,

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QUESTION PRESENTED

The National Press Photographers Association, the Radio-Television News Directors Association, the Reporters Committee for Freedom of the Press, and the Society of Professional Journalists will address the following question:

Whether, under the First and Fourth Amendments, a police officer may arrest a journalist solely for the purpose of preventing the journalist from gathering news.

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The National Press Photographers Association, the Radio-Television News Directors Association, the Reporters Committee for Freedom of the Press, and the Society of Professional Journalists submit this brief as *amici curiae* supporting Petitioner Albert Durruthy.[1]

INTEREST OF THE *AMICI CURIAE*

The National Press Photographers Association is a non-profit professional organization dedicated to the advancement of photojournalism, its creation, editing and distribution, in all news media. The NPPA vigorously promotes freedom of the press in all its forms. The NPPA's more than 10,000 members include still and television photographers, editors, students and representatives of businesses that serve the photojournalism industry.

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[1] Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, the Society promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Each of the *amici curiae* has a strong interest in this case, which raises important questions concerning the First Amendment rights of the press to engage in newsgathering activities. This Court has recognized that newsgathering is a necessary antecedent to news reporting, and therefore is protected by the First Amendment. When government officials restrict the press in its ability to gather news, as occurred in this case, the result is to limit the news itself.

STATEMENT OF THE CASE

This case arises from events in April 2000 surrounding the plight of Elián González and the federal government's efforts to return him to his father in Cuba.[2] At 5:30 AM on April 22, 2000, federal officials removed Elián González from his uncle's home in Miami. Pet. App. 38a. In response to that action, protestors gathered in downtown Miami, and sporadic episodes of rioting ensued. *Id.* at 3a, 38a.

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[2] Elián González, at the time a five-year-old Cuban boy, was rescued by American fishermen after surviving a shipwreck while trying to reach the United States with his mother. Federal marshals forcibly removed González from the home of his Miami relatives after they refused the orders of the U.S. Department of Justice to turn him over.

Later that morning, Miami photojournalist Albert Durruthy was filming demonstrations on Flagler Street in downtown Miami. Pet. App. 38a. Police had closed the downtown area to vehicular traffic and by approximately 11:00 AM, had cleared the intersection of Flagler Street and 27th Avenue of protestors. *Id.* At about that time, police arrested and handcuffed NBC cameraman Bruce Bernstein. *Id.* Durruthy attempted to film Bernstein's arrest, but as he approached, the arresting officer instructed Durruthy to return to the sidewalk. *Id.* Durruthy promptly complied, walking backward toward the sidewalk as he continued to film. *Id.*

While Durruthy was moving toward the sidewalk, Officer Jennifer Pastor, who was standing in a line of officers approximately 60 feet away, broke toward Durruthy. Pet. App. 27a. Officer Pastor acted without instructions or permission from any superior officer. *Id.* She admitted knowing that Durruthy, who was carrying a large television camera and was accompanied by a soundman, was a member of the press. *Id.* Officer Pastor and at least two other officers forced Durruthy to the ground and kneeled on his back. *Id.* Despite Durruthy's protestations that he would go peacefully and that his injured arm would not bend backward, the officers pulled his hands behind him, secured his wrists, and pulled him to his feet by his arms. *Id.* at 39a. At no time did Durruthy attempt to resist the officers, nor do the undisputed facts indicate he ever presented any danger to them. *Id.* at 50a-51a. Durruthy was detained in a police van without medical care for six hours before being released. *Id.*

Durruthy subsequently brought an action under 42 U.S.C. § 1983 against Officer Pastor and the City of Miami for illegal arrest and use of excessive force in violation of his rights under the Fourth Amendment, as well as for state law claims for assault, battery and false

arrest. In response to Durruthy's claims, Officer Pastor moved for summary judgment on the basis of qualified immunity. The motion was denied by the U.S. District Court. Pet. App. 53a. On appeal, a divided panel of the Eleventh Circuit reversed, holding that since there was probable cause to arrest Durruthy – based on a subsequently asserted jay-walking statute – Officer Pastor's conduct was reasonable under the Fourth Amendment and she violated no clearly established right. *Id.* at 25a.

ARGUMENT

The facts in this case, insofar as they are presented at the summary judgment stage, show that a journalist, Durruthy, actively engaged in newsgathering and following police instructions, was unlawfully arrested with undue force and detained specifically to prevent his continued videotaping of police activity at an event of national interest. The First Amendment does not permit such a bold attack on newsgathering.

1. This Court has recognized that newsgathering is a necessary antecedent to news reporting, and therefore is itself protected by the First Amendment. As the Court has stated, "without some protection for seeking out the news, freedom of the press could be eviscerated" *Branzburg v. Hayes,* 408 U.S. 665, 681 (1972); *see also id.* at 728 (Stewart, J., dissenting) ("No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised."). *See generally Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) ("[f]ree speech carries with it some freedom to listen," which is the essence of newsgathering). Lower courts have likewise recognized that newsgathering is constitutionally protected. *See, e.g., In*

re Fitch, Inc., 330 F.3d 104, 108 (2d Cir. 2003) (the disruption of newsgathering activity is "particularly inimical to the vigor of a free press") (quoting *O'Neill v. Oakgrove Constr., Inc.*, 523 N.E.2d 277 (1988)); *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987), (subject to certain qualifications, "the process of newsgathering is a protected right under the First Amendment"), *cert. denied*, 481 U.S. 1015 (1987); *see also* Bunker et al., *Triggering the First Amendment: Newsgathering Torts and Press Freedom*, 4 COMM. L. & POL'Y 273, 288 (1999) (discussing levels of First Amendment protection for newsgathering); Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838, 843-44 (1971) (the right to gather information is "logically antecedent and practically necessary" to an effective freedom of the press).

When government officials prevent the press from gathering news, their action implicates more than just the interests of the press. The press, "as an agent of the public at large," represents the interests of the public by supplying information and creating the conditions under which discussion and debate essential to the democratic process can take place. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (observing that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," and that the Framers "thoughtfully and deliberately selected" the press to receive express constitutional protection so that it could "improve our society and keep it free"); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) ("[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.").

These concerns apply directly to this case, which arises from the public debate that surrounded the Elián González affair. The press, through effective newsgathering, plays a critical role in informing any such national discussion. The Eleventh Circuit's decision, however, shields a government official from liability for improper conduct motivated solely to prevent lawful newsgathering. The decision, if not corrected, will have a chilling effect on First Amendment rights. As explained above, this Court has consistently recognized that newsgathering is a necessary antecedent to news reporting, and is protected by the First Amendment. When government officials restrict the press in its ability to gather news, as occurred in this case, the result is to place limits on news itself.

2. Petitioner submitted evidence that Officer Pastor arrested him solely to prevent him from engaging in newsgathering. The Eleventh Circuit majority held that this evidence is irrelevant, invoking the general principle that an officer may arrest a person for an invalid reason, but still be entitled to qualified immunity if the arrest can be justified on another ground. Citing, among other cases, *Whren v. United States*, 517 U.S. 806, 813 (1996), the court held that "Pastor's personal motivation for arresting Durruthy is irrelevant to the determination whether she had probable cause." *Durruthy v. Pastor*, 351 F.3d 1080, 1088 (11th Cir. 2003).

In *Whren*, police stopped a suspicious vehicle for a routine traffic violation. In the course of the stop, the police observed two large bags of crack cocaine in the vehicle. They proceeded to arrest the driver and passengers on various drug-dealing charges. In challenging their convictions, the defendants argued that the police did not have probable cause to detain them prior to the traffic stop and that the asserted traffic

violation was merely a pretext to investigate perceived suspicious activity.

Absent from *Whren* was any finding that the traffic stop was motivated by an unconstitutional purpose. In this case, in contrast, Officer Pastor arrested Durruthy to prevent his continued newsgathering, a constitutionally protected activity. *Branzburg,* 408 U.S. at 684 ("without some protection for seeking out the news, freedom of the press could be eviscerated"). The basis for Durruthy's arrest was therefore unconstitutional, a fact which Officer Pastor either knew or should have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

Even if an officer has discretion to arrest individuals for violating a general law (such as a law against standing in the street or driving with a broken taillight), the officer is forbidden to exercise that discretion on the basis of an unconstitutional reason. Thus, for example, an officer could not arrest only African-American citizens standing in the street on the basis of their race. *See Whren*, 517 U.S. at 813 (recognizing "that the Constitution prohibits selective enforcement of the law based on considerations such as race"); *see also United States v. Akram*, 165 F.3d 452, 455 (6th Cir. 1999) (noting that a traffic signal violation provided probable cause for traffic stop, but that the stop would be invalid if "the motorist can demonstrate that the police have violated some other provision of the Constitution"). Similarly, a police officer may not exercise her discretion to arrest an individual solely on the basis of whether the individual is engaged in the constitutionally protected activity of gathering news. As Judge Stahl noted in his dissent below, "it is patently obvious to any observer of the videotape evidence that the sole reason for Pastor's conduct was that she and the other officers wanted Durruthy to stop filming the arrest of the NBC cameraman." *Durruthy*, 351 F.3d at 1097 (Stahl, J.,

dissenting). Because Officer Pastor's motive was unconstitutional, the arrest was unlawful.

In similar circumstances, this Court has rejected efforts to hide behind the veil of official discretion. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (while "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried," the prosecutor may not exercise that discretion for an unconstitutional reason, *e.g.*, "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant") (internal citations and quotation marks omitted); *Wade v. United States*, 504 U.S. 181, 185 (1992) (prosecutor's discretionary authority to recommend a downward departure in sentencing for rendering substantial assistance to the government "is subject to constitutional limitations"). The constitutional principles applicable to the discretionary acts of prosecutors apply equally to the discretionary acts of police officers.

Whren's general rule permitting the government to offer pretextual reasons for an arrest does not foreclose inquiry into the actual purpose behind state action where, as here, another constitutional right is implicated. As this Court stated in justifying consideration of the purpose of a motor vehicle checkpoint under the Fourth Amendment, "courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive government conduct from that which is lawful." *City of Indianapolis v. Edmond*, 531 U.S. 32, 46-47 (2000).

This case is distinguishable from *Whren* for another reason. The officers in *Whren* asserted the lawful basis for the traffic stop when the stop was made, not after the fact. In this case, however, Officer Pastor did not conjure

up the purported lawful basis for arresting Durruthy until long after the arrest was made, and then, only to shield a purpose she knew or should have known was unlawful. As Judge Stahl noted in his dissent, "we should 'be troubled by an argument suggesting that a legitimate basis for an arrest identified *only after* the arrest would provide sufficient grounds therefor.'" *Durruthy*, 351 F.3d at 1097 (Stahl, J., dissenting) (quoting *Rogers v. Powell*, 120 F.3d 446, 453 n.5 (3d Cir. 1997) (emphasis added by Judge Stahl)). This is especially true here where the arrest was perpetrated to block exercise of constitutionally protected newsgathering.[3]

3. At the very least, Officer Pastor may not selectively enforce the jay-walking statute to prevent lawful newsgathering. In this sense, this case is similar to *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), in which three African-American ministers led a peaceful march through downtown Birmingham. Shortly after the march began, police halted it and arrested the ministers for violating an ordinance prohibiting public demonstrations held without a city permit. This Court reversed the convictions, holding that the arbitrary nature of the statute and its selective enforcement did not guarantee adequate First Amendment protections. *Id.* at 158-59. Likewise in this case, Officer Pastor may not arbitrarily and selectively enforce a statute solely to limit newsgathering.

4. Even if the Court were to ignore the evidence of Officer Pastor's actual reason for arresting Petitioner, the grounds she asserts do not show that she had probable cause for the arrest. Officer Pastor initially asserted that

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[3] This case also differs from *Whren* in that Officer Pastor did not actually suspect that Durruthy was engaged in criminal behavior at the time of the arrest. *Whren*, 517 U.S. at 809.

she arrested Durruthy for violating Fla. Stat. § 843.02, which makes it a misdemeano to "resist, obstruct, or oppose any officer ... without offering or doing violence to the person of the officer." According to Officer Pastor, "arguable probable cause existed because [Durruthy] interfered with the police by walking out into the street while the police were trying to clear the street." *Durruthy v. City of Miami*, 235 F. Supp. 2d 1291, 1297 (S.D. Fla. 2002). The facts, however, do not come close to supporting this as a basis for the arrest. Far from "resist[ing], obstruct[ing], or oppos[ing]" an officer, Durruthy was clearly obeying officer instructions that he return to the sidewalk. Based on findings by the district court, "as soon as the police instructed [Durruthy] to return to the sidewalk he immediately obeyed. Plaintiff walked backwards slowly in the direction of the sidewalk. It was while he was retreating that Pastor arrested him. Thus, [Durruthy] clearly complied with the instruction of the police officer to some extent." *Durruthy*, 235 F. Supp. 2d at 1297. The district court went on to consider whether Durruthy "did not stop filming and did not move quickly" in response to an officer's instructions. But, the court concluded, that based on the facts presented, that Durruthy's actions could not "have given rise to the impression that he was resisting, obstructing or opposing the officer." *Id.* When Durruthy and his attorney met with the State Attorney several weeks later, Durruthy's counsel showed the State Attorney the videotape of Officer Pastor's arrest. The State Attorney immediately dropped all charges against Durruthy. *Durruthy*, 351 F.3d at 1096.

Officer Pastor alternately claims she could have arrested Durruthy for violating Fla. Stat. § 316.130, a jay-walking statute that, among other things, prohibits pedestrians from walking "along and upon the portion of a roadway paved for vehicular traffic." The district court found, however, that (1) there was no vehicular traffic in

the roadway; (2) Durruthy was an obvious member of the media acting within the scope of his journalistic duties; and (3) Durruthy was acting on permission and at the time of the arrest was complying with all officer instructions. *See* Pet. App. 45a. These facts undermine the validity of the alternative basis for the arrest.

5. At a minimum, summary judgment was premature in this case, particularly given the First Amendment freedoms at stake. Judge Stahl identified several unresolved questions of fact, including whether Durruthy or other members of the media had permission to be in the street; whether Officer Pastor was aware that such authorization had been granted; and whether she was aware she was violating Durruthy's clearly established constitutional rights when she pinned him to the street and arrested him. *Durruthy*, 351 F.3d at 1097 (Stahl, J., dissenting). These disputed facts are sufficient to require the denial of a motion for summary judgment.

Also relevant to the probable cause inquiry is the fact that Durruthy was seized while engaged in constitutionally protected activity. In *Zurcher v. Stanford Daily,* 436 U.S. 547, 564 (1978), this Court stated that Fourth Amendment requirements should be applied with "scrupulous exactitude" when the items seized are protected by the First Amendment. *See also Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) (stating that "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material"). When seizures implicate newsgathering activity presumptively protected by the First Amendment, the Fourth Amendment should be applied with "scrupulous exactitude," and the reasonableness determination should take account of the fact that the search or seizure prevents or interferes with activity that is protected by the First Amendment. That standard is not met here.

6. For a constitutional right to be clearly established, its contours must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citations omitted)).

As noted above, decisions of this Court and other courts recognize that newsgathering activities are protected under the First Amendment. Moreover, the official policy of the City of Miami is that "no warrantless arrest of media personnel for non-felonies acts arising out of the pursuit of the news gathering function will be made without the express authority of the senior on-duty commanding officer or the staff duty officer." Pet. Br. 4. The fact that Officer Pastor's actions violated her own department's policy is certainly relevant to whether she was "on notice" that her conduct "violat[ed] established law." *Hope*, 536 U.S. at 741 (citing *United States v. Lanier*, 520 U.S. 259 (1997)). At a minimum, she had "fair warning" that an arrest of Durruthy to prevent lawful newsgathering was unconstitutional. *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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